INDEX.

PAGE

Opinions below 2

Jurisdiction 2

Statutes, constitutional and treaty provisions provided.. 3

Statement 4

Questions presented 14

Specifications of errors to be urged 16

Reasons for granting the writ 19

Appendix 29

Statutes involved 29

Constitutional provisions involved 31

Missouri Partnership Statutes, Revised Statutes, Sections 87, 88 ..... 18, 32

Kansas Statute of Wills 33

Cases Cited.

Baldwin v. Maryland, 179 U. S. 220 10

State ex rel. v. Bradbury, 123 Kan. 495 5

Brown v. Fletcher's Estate, 210 U. S. 82 12

Burrowes v. Goodman, 50 F. (2d) 92 (C. A. 2) 12

Cholmondeley v. Clinton, 19 Ves. 261, s. c. Cooper 80 21

Cooper v. Newell, 173 U. S. 555, 566-567 ..... 10, 27

Commissioner v. Sunnen, 333 U. S. 591 10

In re Cowdray, 69 Cal. 32 21

Donald v. White Lumber Co., 180 F. 2d 435 9

Durousseau v. United States, 6 Cranch. 307, 313-314 25

Goedecke v. Gralnick, 354 Mo. 478, 487-488 10

Hurd v. Hodge, 334 U. S. 24 23

PAGE

Kilgore v. Dr. P. Phillips & Sons, 12 So. 2d 465, 152 Fla. 578 24
Magwire v. Tyler, 17 Wall. 253-294 27
Manning v. Ketcham, 58 F. 2d 945, 949 ..... 11, 12
State to use Miller's Adm'r v. Bidlingmaier, 26 Mo. 483 5
In re Moffett Brothers Partnership Estate, 345 Mo. 741-751 (R. 37-50, 692-701) 2
Mooney v. Holahan, 294 U. S. 103 26
State to use Mueller's Adm'r v. Reinhardt, 31 Mo. 95 5
National Bank of Topeka v. Mitchell, 154 Kan. 276 ..... 6, 12
New Orleans v. Citizens Bank, 167 U. S. 371 10
Osborn v. Bank of United States, 9 Wheat. 738, 866 25
Peyton v. Chase County National Bank, 124 Kan. 763 5
Picking et al. v. Pennsylvania R. Co., 151 F. (2d) 240 23
Root Refining Co. v. Universal Oil Products Co., 169 F. 2d 514, 541 21
Rose v. Himely, 4 Cranch. 241, 277 12
Shelley v. Kraemer, 334 U. S. l. c. 17-18 22
Skelly Oil Co. v. Universal Oil Products Co., 86 N. E. 2d 875 21
Stacy v. Thrasher, 6 How. 44 6
State v. Bacon, 61 Atl. 653, 27 R. I. 252 24
Sovereign Camp W. of W. v. O'Neill, 266 U. S., l. c. 297 24
Treinies v. Sunshine Mining Co., 308 U. S. 66, 78 9
Turnverein v. Hagerman, 232 Mo. 693 10
United States v. Trierweiler, 52 F. Supp. 4 11
Valle v. Stengel, 176 F. 2d 692, 702, Pars. 7, 8, 9 and 10 23
Verplanck v. Van Buren, 76 N. Y. 247 24
In re Whittemore, 69 Cal. 67 21
White v. McCoy Land Co., 87 S. W. 2d 672, 229 Mo. App. 1019 24
White v. McCoy Land Co. and Scarritt, 101 S. W. 2d 763 24

PAGE

White v. Scarritt, 341 Mo. 1004 24
Williams v. United States, No. 365, October term, 1950 24
Yager v. Liberty Royalties Corp., 123 F. 2d 44, 47 5

Statutes Cited.

Amendment XIV, Section 1 ..... 4, 31
Article IV, Section 2, Clause 1, United States Constitution 4, 17, 23, 26, 31
Civil Rights Act, April 9, 1866 ..... 4, 26
Rule 12 (b) (6), Rules Civil Procedure 1, 13, 14, 16, 27
Sections 1254 (1), 2101 (c), Title 28, United States Code 2
Sections 41, 42, 43, 47, 48 and 49a, Title 8, U. S. C. 2
Sections 41 and 42, Title 8, U. S. C. 19, 23
Section 42, Title 8, U. S. C. 17, 23
Section 43, Title 8, U. S. C. 17, 24
Sections 43, 47 and 48, Title 8, U. S. C. 14, 19
Sections 47 and 48, Title 8, U. S. C. 17
Stat. at L. 27, Chap. 31, Sec. 1 4
Section 1 of XIVth Amendment, United States Const. 17
United States Code, Title 8 29

Text Cited.

Freeman on Judgments, 5th Ed., Vol. 2, Sec. 629 8

Miscellaneous.

Article III, Treaty with France 18, 31

In the Supreme Court of the United States

October Term, 1950.

No._____.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Petitioner,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the Eighth Circuit, entered February 26, 1951, affirming the judgment of the United States District Court for the Western District of Missouri, adjudging that the complaint (R. 2-33, Exhibits 33-71) did not state a cause of action under the Civil Rights Acts, and that the District Court did not need to comply with the requirements of Rule 12 (b) (6) of the Federal Rules of Civil Procedure and other provisions of said rules.*

*References to the printed record will be thus: (R. 2-33), e. g., pages 2 to 33 of the printed record. And (Pro. 1-22), e. g., pages 1 to 22 of the "Proceedings in United States Court of Appeals."

Opinions Below.

The opinion of the Court of Appeals is reported in 187 F. (2d) 242. See also Proceedings in United States Court of Appeals (Pro. 1-13).

The opinions of the District Court are in 75 F. Supp. 303 and 87 F. Supp. 438. Also in Vol. III (R. 769-784).

Jurisdiction.

The judgment of the Court of Appeals was entered on February 26, 1951. On March 16, 1951, a petition for rehearing, filed March 13, 1951, was denied (Pro. 15-20). The jurisdiction of this Court is invoked under Sec. 2, Art. III, U. S. Constitution, and Sections 1254 (1), 2101 (c) and 2106, Title 28, United States Code.

The issues as to which petitioner seeks this Court's review involve the construction of the Civil Rights Act of April 9, 1866, embodied in Sections 41 and 42, and also of Sections 43, 47 (2) (3), 48 and 49a, Title 8, U. S. C. Also the failure of the Court of Appeals to give full faith and credit and *res judicata* effect to the decision of the Supreme Court of Missouri in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751 (R. 37-50, 692-701), which decision with the admitted facts, establish that the Judgment entries and orders of the District Court of Harper County, Kansas, entered as a sequel to the void order of the Missouri "special" judge appointing Commerce Trust Company to administer estates with conflicting interests, were void, and that the loss resulting from the misappropriation of petitioner's property to satisfy said void judgment entries and orders conclusively establishes petitioner's right to recover under said Civil Rights Acts. The complaint (R. 2-33) with Exhibits (R. 33-71) does state a valid claim for relief within the jurisdiction

of the federal courts under the Civil Rights Acts. This issue, on the ground that the complaint "does not state a cause of action" (R. 83), was decided adversely to petitioner in the United States Court of Appeals (Pro. 1-13, 14).

Statutes, Constitutional and Treaty Provisions Provided.

The pertinent parts of the statutes and constitutional provisions and treaty involved are set out in Appendix, pages 29-33.

STATEMENT.

The Court of Appeals affirmed a judgment of the District Court dismissing the complaint on the ground that "it does not state a cause of action" (R. 83). Said complaint (R. 2-33, Exhibits 33-71) states the facts in this case so clearly that reference is made thereto, and same is made a part hereof without reproducing any part thereof here.

Said complaint discloses that respondents, and a Missouri "special" probate judge (R. 3-4), and a Kansas state district judge, were parties to a conspiracy to deprive petitioner and her testator of the rights secured to them by the Civil Rights Act of April 9, 1866 (14 Stat. at L. 27, Chap. 31, Section 1), enacted before the XIVth Amendment, and as a Missouri citizen in Kansas and Oklahoma, by Article IV, Section 2, clause 1, and by Section 1 of the XIVth Amendment of the United States Constitution.

In accomplishing said purpose respondents requested said "special" probate judge to remove Thomas S. Moffett as executor of the John Moffett estate on the ground that the interests of said estate and partnership estates which he was administering were in conflict, which request was sustained on said ground and on the ground that the same person was not qualified to administer estates with conflicting interests. Thereupon, on the application of Commerce Trust Company, the same special probate judge—although he had found that the same person was disqualified to administer said estates because of their conflicting interests—yet appointed Commerce Trust Company to act in the same identical conflicting capacities, and did so for the purpose alleged in paragraph 2 of the complaint (R. 4). Thereupon Commerce Trust Company, notwithstanding there were sufficient assets in Missouri to satisfy

a groundless claim made by it (R. 24) and knowing that petitioner's testator had retained a local counsel who was unpopular with the state district judge (R. 161-162), whose court was 310 miles from Kansas City, Missouri, was permitted by said state district judge, in direct violation of the laws of the State of Kansas, to intervene in said conflicting capacities (R. 19) and to prosecute said unfounded claim as executor of the John Moffett estate against itself as Missouri administrator of Moffett Brothers partnership estate and on March 5, 1932, to make a void judgment entry for $143,829.96 against itself in said capacity in favor of said John Moffett estate.

The Missouri Supreme Court holds that the act of the "special" probate judge in so appointing Commerce Trust Company to administer said conflicting estates was a nullity (*State to use Miller's Adm'r* v. *Bidlingmaier,* 26 Mo. 483; *State to use Mueller's Adm'r* v. *Reinhardt,* 31 Mo. 95, affirming 26 Mo. 483). The Kansas courts were governed by the rule that the same person cannot represent conflicting interests and that any resulting judgment is void in that state (*Peyton* v. *Chase County National Bank,* 124 Kan. 763; *State ex rel.* v. *Bradbury,* 123 Kan. 495; *Yager* v. *Liberty Royalties Corp.,* 123 F. 2d 44, 47).

Commerce Trust Company, through emissaries, had a secret conference with said state district judge, not discovered by petitioner until some 16 months thereafter (R. 183), by virtue of which a void entry of a judgment for $101,228.06 (R. 21, 102-103) was made against the Oklahoma administrators of the assets of a partnership estate in Oklahoma—which administrators were not before the Kansas district court in that capacity. Said Kansas state judge, sitting in Kansas, without jurisdiction so to do, entered a decree of partition (R. 31, 71, 370-396) on the records of his court of some 17,000 acres of Oklahoma lands. Pursuant to a void order of the Missouri probate

court (R. 529) with reference to lands in Oklahoma, said Commerce Trust Company received a deed (R. 526-538) to said lands from the surviving administrator. And pursuant to a void order of said probate court, and another of said Kansas state district court, Commerce Trust Company made a deed conveying Oklahoma lands to the John Moffett estate in part satisfaction of the void judgment entered against it as Missouri administrator of Moffett Brothers partnership estate (R. 530).

Said Commerce Trust Company was not in possession of, nor had it title to any of the assets of said Moffett Brothers partnership estate in Kansas (R. 20, 19). So that, no judgment *in rem* could have been rendered against it in Kansas, but it was of the variety mentioned in *Stacey* v. *Thrasher*, 6 How. 44, to-wit: *in personam* and void, as held by the Supreme Court of Kansas in *National Bank of Topeka* v. *Mitchell*, 154 Kansas 276.

Some 14 groundless actions (R. 9-14), pursuant to said conspiracy, were instituted against petitioner and her interest by the conspirators, particularly by Commerce Trust Company, seeking an aggregate of about $5,000,000.00 (R. 9), many of which groundless actions are still pending, and the institution and maintenance of which on the dockets of the courts so affected petitioner's and the Moffett credit (R. 28) that, in addition to the 8,080 acres of Moffett Brothers Kansas lands (R. 22) and the 17,000 acres of Oklahoma lands (R. 31), where petitioner owned the majority interest, some 30,000 additional acres of Kansas lands were lost (R. 14). The Kansas and Oklahoma lands were sacrificed for a moiety of their value, pursuant to the conspiracy, in carrying out which, amongst other instances is one to the effect that said district judge authorized the sacrifice of all said Kansas lands for $99,700.00 by credits for said sum on said void judgment against Commerce Trust Company as Missouri adminis-

trator of Moffett Brothers partnership estate, and within a year thereafter—although there was no change in values—and although appraisers appointed by said district judge had valued said lands at $181,873.93—which were inventoried in the probate court as worth $255,040.00 and which were reasonably worth the sum of $318,800.00 (R. 170)—yet said district judge knowingly approved the unlawful misappropriation of said property for said moiety of its value.

After said misappropriation of said Oklahoma and Kansas Moffett Brothers lands through the district court of Harper County, Kansas, B. C. Howard and Commerce Trust Company instituted a proceeding in the probate court at Kansas City (R. 25), seeking authority from said probate court on the part of Commerce Trust Company to pay from Moffett Brothers partnership assets to Mr. Howard payment from said assets for his services in despoiling said estate as its attorney by causing same to be turned over to the estate of John Moffett, of which Commerce Trust Company was executor, in part satisfaction of said void judgment against Commerce Trust Company.

Mrs. Weede became a party to said proceedings, represented by Orlin A. Weede, who also ostensibly represented Mr. Howard in said proceedings, wherein respondents offered in evidence the said judgment entries and court orders by the District Court of Harper County, Kansas, and asserted that said entries and orders were entitled to full faith and credit and were *res judicata* of the issues then before the court (R. 660-661), which contentions were sustained by the probate court, and on appeal to the Missouri circuit court said contentions were likewise sustained. But, on appeal to the Supreme Court of Missouri from the judgment of said circuit court, said court found that Commerce Trust Company represented conflicting

interests (R. 48, 49-50), and that Mr. Howard represented said Commerce Trust Company in said conflicting capacities, and thereupon it entered a judgment and filed an opinion (R. 37-50, 692-701), reversing the judgment of the circuit court, with directions, and denying any faith or credit or *res judicata* effect to said judgments and orders in the Kansas courts. Said judgment and proceedings in the Supreme Court of Missouri, being later than the Kansas entries, are pleaded as *res judicata* in the dismissed complaint (R. 25), as facts judicially found rendering the Kansas entries void under the laws of Kansas, Missouri and the United States.

The opinion of the Court of Appeals contains the following statement (Pro. 11):

> "Plaintiff's allegations that the decisions of the various state courts in litigation in which she was involved were void or arbitrarily or willfully made merely expresses an opinion not uncommon among defeated litigants, and, as appears from the face of the complaint, not entertained by the State Supreme Courts which reviewed the judgments."

The allegations in the complaint (Par. 45, R. 25) with reference to the proceedings in the Supreme Court of Missouri as reflected in Exhibit "E" (R. 37-50) made part of said complaint, show that the Court of Appeals entirely overlooked the allegations of said complaint as to said point. Said decision of the Supreme Court of Missouri, being the last, was permitted by the Court of Appeals to be collaterally attacked by respondents in the Court of Appeals, notwithstanding the laws of both Missouri, Kansas and the Federal courts, including this, hold that the last judgment cannot be collaterally attacked by showing the first (Freeman on Judgments, 5th Ed., Vol. 2,

Sec. 629; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, l. c. 78; *Donald* v. *White Lumber Co.*, 180 F. (2d) 435).

The contentions of respondents in said cause in the Supreme Court of Missouri as to said Kansas judgments are reflected in the briefs of Commerce Trust Company and Messrs. Weede and Howard at pages 743 to 745 of 345 Mo. (R. 39-41). The contentions of petitioner in that case are reflected in the reporter's report shown on pages 742 and 743 of said 345 Mo. (R. 38-39) and are made part of the complaint by being included in Exhibit "E," made part of said complaint (R. 25).

As appears from said Exhibit "E" (R. 37-50) and also from pages 750 and 751 of 345 Mo., the Supreme Court of Missouri found as follows:

> "There can be no question on the conflicting interests of the John Moffett estate and the Moffett Brothers estate in the partition-accounting suit, and the rule that counsel cannot lawfully represent conflicting interests in the courts of the land is as old as our system of jurisprudence." (P. 750, R. 48.)
>
> "As we have stated before, there can be no question as to the conflict of interest, in the partition-accounting suit, between the John Moffett estate and the Moffett Brothers estate, and the rule, as we have seen, is that an attorney cannot receive pay from both sides where the respective interests are conflicting." (P. 751, R. 49-50.)
>
> "And notwithstanding that *the principal contention* in the partition-accounting suit was on the claim of the John Moffett estate against the Moffett Brothers estate, claimant admits that he represented both estates in that suit. And it appears that claimant, at the trial of the partition-accounting suit, presented the evidence that resulted in a judgment, against one of his clients, for $143,829.96. The picture can be better appreciated by visioning John and Thomas S. Moffett as living and adversaries in a law-

suit on the same claim of indebtedness, as here, and claimant representing both of them." (P. 750, R. 48.)

That the said conflict so found by the Supreme Court rendered the said Kansas judgments void was pleaded as *res judicata* in the complaint (R. 25). The Court of Appeals, having failed to give full faith and credit to said Missouri Supreme Court judgment, rendered a decision in conflict with the decision of this Court in *Cooper* v. *Newell*, 173 U. S. 555, l. c. 566-567.

Said judgment of the Supreme Court of Missouri was properly pleaded as a part of petitioner's claim or cause of action (*New Orleans* v. *Citizens Bank*, 167 U. S. 371; *Baldwin* v. *Maryland*, 179 U. S. 220; *Turnverein* v. *Hagerman*, 232 Mo. 693). And so, as to this case, in the District Court and Court of Appeals, said judgment of the Supreme Court was conclusive as to said facts so found on the issue as to whether or not the Kansas judgments, by means of which petitioner and testator lost their properties, were void under the law declared in *Goedecke* v. *Gralnick*, 354 Mo. 478, l. c. 487-488, which declares the law in exactly the same way as this Court declared it in *Commissioner* v. *Sunnen*, 333 U. S. 591, l. c. 597-598, as to "matters in issue or points controverted, upon the determination of which the finding or verdict was rendered" in a second action "where the second action between the same parties is upon a different cause of demand," reversing the author of the opinion of the Court of Appeals herein conclusively adjudicating that Commerce Trust Company and its attorney, B. C. Howard, represented conflicting interests, thereby depriving petitioner of her property without due process of law and denying her the equal protection of the laws in relation of the XIVth Amendment to the United States Constitution.

The District Court, in this case at the request of respondents, permitted them to file matter and material outside the pleadings, in accordance with the provisions of Rule 12 (b) (6), between April, 1948, and December 1, 1949 (R. 83), which are reflected in the 787 pages of record filed by petitioner, and in the 1,992 pages of supplemental records filed by respondents. The Court of Appeals ignored the foregoing facts in its opinion, except insofar as its opinion contradicted the record, as instance, when it stated in said opinion that the Supreme Courts of the states—including, of course, Missouri—did not hold that the decisions of the various state courts in Kansas were void and arbitrarily and willfully made, whereas the said decision of the Supreme Court of Missouri is directly contrary to said statement in said opinion of the Court of Appeals, and by its finding conclusively establishes that all the prior judgments and orders of the District Court of Harper County, Kansas, were void and arbitrarily and unlawfully made.

The Court of Appeals also stated in its opinion that, "assuming that the state court proceedings were not within the jurisdiction of the courts which decided them, • • • they were not void but, at most, erroneous," thereby rendering a decision in conflict with all the other circuits and this Court, and the courts of Missouri, Kansas, Oklahoma and England, well stated in *Manning* v. *Ketchem,* 58 F. (2d) 948 (C. C. A. 6). Thus, l. c. 949:

> "(2, 3) When a judge acts in the clear absence of all jurisdiction, *i. e.,* of authority to act officially over the subject matter in hand, the proceeding is *coram non judice.* In such a case the judge has lost his judicial function, has become a mere private person, and is liable as a trespasser for the damages resulting from his unauthorized acts. Such has been the law from the days of the Case of the Marshalsea,

> 10 Coke 68. It was recognized as such in *Bradley* v. *Fisher,* 13 Wall. (80 U. S.) 335, 351, 20 L. Ed. 646. In *State ex rel. Egan* v. *Wolever,* 127 Ind. 306, 26 N. E. 762, 763, the court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.' "

Manning v. *Ketcham* says "• • • the highest court of the state announced that appellant was acting without his jurisdiction." Herein, the highest courts in Missouri (345 Mo. 741) and Kansas (154 Kan. 276) say the same as to said Kansas state judge. The Missouri ruling here, like the Kentucky ruling there, is *res judicata.*

The judgment entry of the Kansas state court against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate, and against the administrators of the Oklahoma partnership estate, were void irrespective of the conflict of interest question, because said administrators had no property of said estates in their possession or under their control in the state of Kansas under the law as declared by this Court in *Rose* v. *Himely,* 4 Cranch. 241, 277; in *Brown* v. *Fletcher's Estate,* 210 U. S. 82, and other cases; and the Supreme Court of Kansas in *National Bank of Topeka* v. *Mitchell,* 154 Kan. 276, 118 Pac. (2d) 519, citing said cases, and the Federal case of *Burrowes* v. *Goodman,* 50 F. (2d) 92 (C. A. 2).

Notwithstanding an executor or administrator under the law of Missouri has always been recognized as an instrument or agency of the state, provided for by the laws of the state, to enable the state in the exercise of its sovereign power to transfer the properties of deceased persons to those to whom its laws direct such properties to be transferred, yet the opinion of the Court of Appeals holds

(Pro. 11) that the Commerce Trust Company was not a state agent nor a repository of state power. And it expressly declared that the complaint failed "to show that plaintiff has suffered or will suffer the deprivation of a federal right" (Pro. 12).

Petitioner seeks certiorari because the rulings of the Court of Appeals are in conflict with the rulings and decisions of all the other courts mentioned in paragraph 5 of Rule 38 of this Court by reason of which the application of the doctrine of "sound judicial discretion" makes the granting of the writ in this case a matter of right and not merely of grace.

Petitioner invokes the appellate jurisdiction conferred on this Court by Sections 1 and 2 of Article III of the Constitution, and states no exception has been made by Congress to the exercise of said appellate jurisdiction. Congress could not delegate legislative power to this Court to divest itself of that jurisdiction which is vested in it by the Constitution.

The District Court, without ruling on petitioner's motions for leave to amend the complaint and to file a supplemental complaint as to matters occuring since the institution of the action, refused to pass on the motion for summary judgment, as required by Rule 12 (b) (6), notwithstanding petitioner was put to great expense in filing matter and material in opposition to respondents.

Many other allegations in said complaint deal with questions which are not reproduced in this statement because they are briefly and accurately stated in the complaint made part hereof, and some thereof are elsewhere referred to herein, and in the supporting brief.

QUESTIONS PRESENTED.

I.

The main issue presented is whether the Court of Appeals erred in holding that Sections 41 and 42 (from Civil Rights Act of April 9, 1866) and 43, 47 and 48, Title 8, U. S. C., were not intended to establish, and did not establish, a civil cause of action against a state agent (an executor and administrator) and fellow conspirators who, knowingly and purposefully, misused state power, pursuant to a conspiracy with two state judges and said state agent, by means of void court orders and judgments, knowingly and purposefully made, to deprive a citizen of one state and of the United States, through the courts of said state and adjoining states, of the right to acquire and enjoy property devised and bequeathed to petitioner.

II.

Rule 12 (b) (6) of the Rules of Civil Procedure, promulgated by this Court for the guidance of federal district courts, require a federal district court, which permitted the filing of matter and material outside the pleadings, and did not exclude same, to dispose of the case under Rule 56 relating to a summary judgment—where the proof filed by the parties for nearly two years demonstrated that respondents were not entitled to the summary judgment they asked, though petitioner was.

III.

This Court cannot lawfully refuse appellate jurisdiction vested in it by the Constitution and laws of the United States to enable it to perform its indispensable

duty to take jurisdiction as to this case by granting the writ prayed for.

The questions raised in the assignments of error (pages 16-18) are also questions presented by this petition.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that the amended complaint "does not state a cause of action" (R. 83).

(2) In holding (Pro. 13) "Rule 12 (b) is not applicable," and that the District Court was not required by Rule 12 (b) (6) of the Rules of Civil Procedure for the District Courts, converting the motions to dismiss into motions for summary judgment at respondents' request, to decide that respondents were not entitled to a summary judgment.

(3) In holding that (Pro. 11)

> "* * * assuming that the state court proceedings were not within the jurisdiction of the courts which decided them * * * they were not void but, at most, erroneous."

(4) In holding that (Pro. 12)

> "Here the complaint fails to show that plaintiff has suffered or will suffer the deprivation of a federal right."

(5) In holding that it read (Pro. 8) "* * * the complaint in the light most favorable to the plaintiff" whereas it overlooked almost all of the essential allegations of the complaint.

(6) In holding that the members of the conspiracy, in their misuse of state power, did not act under color of the state law when they committed the overt acts pursuant to the conspiracy, depriving petitioner of her property rights.

(7) In holding that because petitioner and Thomas S. Moffett were represented by counsel, said fact obliterated the overt acts of the state agents and officials (R. 23, 551) in discriminating against Thomas S. Moffett and plaintiff and denying to them, intentionally and purposefully, the equal protection of the laws, and depriving them of their property without due process of law.

(8) In holding that the Civil Rights Statute of April 9, 1866, as reproduced in Section 42, Title 8, U. S. C., did not protect, secure or give any property right to petitioner as a citizen of the United States.

(9) In holding that Section 1 of the XIVth Amendment to the Constitution did not secure or guarantee any property rights to petitioner.

(10) In holding that Sections 47 and 48, Title 8, U. S. C., did not authorize petitioner to recover against respondents.

(11) In holding that Section 43, Title 8, U. S. C., did not entitle petitioner to a judgment against respondents.

(12) In holding that Clause 1, Section 2, Article IV, of the Constitution did not protect petitioner, as a citizen of Missouri while in Kansas courts, and give to her the same privileges and immunities as the citizens of Kansas enjoyed under the laws of Kansas.

(13) In holding that citizens of the United States and of Missouri, and persons within the jurisdiction of the states of Missouri, Kansas and Oklahoma, were not entitled to the protection of the aforesaid provisions of the United States Constitution and laws.

(14) In holding (Pro. 11)

> "We dismiss as unworthy of consideration the allegation that the administrators and executors act-

ing under court appointments in the various states in which the property of the estates was located were agents of sovereign powers of the states, and as plaintiffs or defendants in the state court actions were acting under color of law within the meaning of anything in the Civil Rights Acts or the 14th Amendment."

(15) In incorrectly stating in its opinion many facts shown by the record.

(16) In holding that the District Court did not err in failing to rule on each and all of the pending motions filed by petitioner, and in failing to sustain each and all of them.

(17) In failing to grant an injunction to stay proceedings in cause No. 339,134 in the Missouri state court and thereby preserve federal jurisdiction to grant the relief sought from the loss occasioned by the institution and pendency on the docket of said groundless action in the state court for over 20 years.

(18) In failing to hold that the due process provision of the Fifth Amendment to the United States Constitution rendered the Missouri Partnership Statutes, Sections 87 and 88, R. S., 1939, enacted in 1845, made applicable by Article III of the treaty with France, void.

(19) In holding valid the three void deeds made by Commerce Trust Company as a Missouri administrator purporting to convey lands of said Moffett estates in states other than Missouri, all of which were made by authority of void court orders.

(20) In holding that Commerce Trust Company was executor or administrator of Moffett estates because its claimed capacity of the office of executor and adminis-

trator is a direct result of its act in writing the will of John Moffett in consideration of its nomination as alternative executor, which act was a misdemeanor under the statute of Missouri enacted in 1915 (Laws, Missouri, 1915, p. 99).

(21) In failing to state in its opinion the principal facts alleged in the complaint essential to a recovery, and in deciding the case upon the partial statement of facts in said opinion.

(22) In failing to hold that the due process provision of the XIVth Amendment to the Constitution rendered Sections 87 and 88, R. S. Mo., 1939, void.

REASONS FOR GRANTING THE WRIT.

I.

The decision of the Court of Appeals erroneously affirmed the decision of the District Court holding that the complaint "does not state a cause of action" (83), whereas it states that this action arises under the Civil Rights Act of April 9, 1866, now Sections 41 and 42, Title 8, U. S. C.; and under Sections 43, 47 and 48, Title 8, U. S. C., Act IV, Sec. 2, Clause 1, and the XIVth Amendment to the United States Constitution; that petitioner and her testator were denied the equal protection of the laws by a Missouri "special" probate judge and a Kansas state district judge by void orders and judgment entries depriving them of their property under color of state law, pursuant to a conspiracy to which said state officials and respondents were parties (R. 5-6).

Said decision conflicts with decisions of other courts of appeal on the same matter and decides important questions of local law in conflict with applicable decisions

of the Supreme Courts of Missouri, Kansas and Oklahoma, and decides important unsettled questions of federal law which should be settled by this Court, and decides federal questions in conflict with applicable decisions of this Court. The opinion of said court of appeals, in failing to state the essential facts in said complaint on which petitioner based her rights to recover—and in sanctioning the like departure by the District Court—has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision under its Rule 38, as more fully appears from petitioner's supporting brief filed herewith. Petitioner's testator was administering the partnership estates of Moffett Brothers and Moffet Brothers and Andrews, and as executor of the estate of John Moffett. On a verified petition of respondents said "special" probate judge had revoked his letters testamentary on the ground that the same person was not qualified to administer said estates because their interests were conflicting (R. 400-412).

And notwithstanding the actual knowledge resulting from said finding by the "special" probate judge, he thereafter, on application by it, entered orders purporting to appoint Commerce Trust Company to administer said estates in the same identical conflicting capacities as thus occasioned the removal of petitioner's testator.

Said act was done pursuant to the conspiracy so as to enable Commerce Trust Company (R. 4) to perpetrate acts which it later perpetrated, to-wit: prosecuted as executor of John Moffett's estate groundless claims against itself as Missouri administrator of Moffett Brothers partnership estate, on which groundless claims said district judge approved a judgment entry, prepared by respondents, on March 5, 1932, for $143,829.96 (R. 20). Said judgment entry included an entry in favor of Com-

merce Trust Company for $101,228.06 against the Oklahoma administrators of an estate in Oklahoma who were not parties as such and none of the properties of which estate were in Kansas, as a result of a secret conference (R. 183-184, 569, 594) had with said district judge by Messrs. Howard and Weede as emissaries of Commerce Trust Company (R. 102, 184) and pursuant to a ruling made at Kingman, Kansas, 40 miles away from the District Court of Harper County, on February 22, 1932 (R. 182-183), and without notice or knowledge thereof (R. 183) by petitioner until 16 months thereafter. Said Commerce Trust Company had no title to any assets of said partnership estates in Kansas (R. 19, 21) nor was it an administrator in said state. Said Oklahoma administrators were not before the Kansas court in said capacity (R. 21), and none of the assets of the estate which they were administering in Oklahoma were in Kansas. So that the court was without jurisdiction to make or approve such judgment entries.

II.

The fact that the same counsel was on both sides of the same cases in which judgments and orders were made, and that he had secret conferences with the Kansas state district judge, in and of itself prevented a fair trial of any issue in the case. So that petitioner was deprived of her property in violation of the due process of law provision of the XIVth Amendment. As to the legal result, see *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. (2d) 514, l. c. 541; and *Skelly Oil Co.* v. *Universal Oil Products*, 86 N. E. (2d) 875. Beginning with *Cholmondeley* v. *Clinton*, 19 Ves. 261, s. c. Cooper 80, the Supreme Court of California in *In re Cowdray*, 69 Cal. 32, has investigated the authorities, both here and in England, condemning such misconduct of counsel, and *In re Whittemore*,

69 Cal. 67, held that the opposing counsel who retained him to violate his duty was subject to like condemnation for his acts, which also operated to deprive petitioner and her testator of their properties without due process of law, contrary to the prohibition of the XIVth Amendment to the Constitution.

III.

The decision of the Court of Appeals stated in its opinion as follows (Pro. 11)

> " • • • assuming that the state court proceedings were not within the jurisdiction of the courts which decided them, • • • they were not void but, at most, erroneous"

is in conflict with the decisions, on the same subject, of this Court, and of all Circuit Courts and all the States, of England, and of all courts in the Anglo-Saxon jurisdictions.

IV.

Because said Missouri "special" probate judge and said state district judge of Harper County, Kansas, were parties to the conspiracy to use state power to deprive petitioner and her testator of their properties by the unlawful means set forth in the complaint, and respondents were parties to the conspiracy, the complaint stated a cause of action whether the judgments were or were not void, under the principle stated in *Shelley* v. *Kraemer*, 334 U. S., l. c. 17-18.

V.

Petitioner is entitled to recover under the allegations of the complaint, even without reference to the provisions of the XIVth Amendment, since included in said allegations are those which authorize recovery against respond-

ents for violation of petitioner's rights under Clause 1, Section 2, Article IV, of the Constitution under the authorities referred to in *Valle* v. *Stengel,* 176 F. (2d) 692, in paragraphs 7, 8, 9 and 10. And is authorized to recover under said Civil Rights Act of April 9, 1866, now Sections 41 and 42, Title 8, U. S. C., in accordance with the decision of this Court in *Hurd* v. *Hodge,* 334 U. S. 24, construing said Section 42, Title 8, U. S. C. So that, whether Commerce Trust Company was or was not a repository of state power would not prevent the recovery against it in this case.

VI.

Commerce Trust Company, in assuming to act as executor and administrator, was acting under color of state law and therefore, as a repository of state power assumed by it, was an agent of the State of Missouri, and for its wrongful acts in depriving petitioner and testator of their properties is liable to petitioner under the Civil Rights Acts, for the reason that, throughout the ages, it is a sovereign function of a state to provide how properties of deceased persons shall be transferred to those who are entitled to same under the laws of the state, and to provide instruments and agents, such as executors and administrators, in the exercise of such sovereign power to enable the state to distribute properties of such deceased persons to those entitled thereto under the laws of the state.

VII.

Though some conspirators were not state agents, yet, since they were aided and abetted by state judges and conspired with and aided and abetted state agents to accomplish the result occasioned by the unlawful overt acts alleged, all such persons are liable under Section 43,

Title 8, U. S. C., for misusing state power to deprive petitioner of her property, in accordance with the principle applied by this Court in *Williams* v. *United States,* No. 365, October Term 1950, affirming the fifth circuit in 179 F. (2d) 656, wherein it was held that a person not in the employ of a state or city, but who had a courtesy card from a city, and who cooperated with an officer of the city, was held liable under Section 20 of the criminal code, same being *in pari materia* with Section 43, Title 8, U. S. C. See *Picking* v. *Pennsylvania R. Co.,* 151 F. (2d) 240.

VIII.

The institution of 14 groundless actions and claims (R. 9-14) against petitioner's interest more than 20 years ago for approximately $5,000,000.00, most of which remain on the dockets of the courts in which they were instituted, have destroyed the Moffett credit and thereby caused damage to petitioner, renders respondents liable under the common law recognized in *State* v. *Bacon,* 27 R. I. 252, 61 Atl. 653; *Kilgore* v. *Dr. P. Phillips & Sons,* 12 So. (2d) 465, 152 Fla. 578; *Verplanck* v. *Van Buren,* 76 N. Y. 247; *White* v. *McCoy Land Co.,* 87 S. W. (2d) 672, 229 Mo. App. 1019; *White* v. *Scarritt,* 341 Mo. 1004; *White* v. *McCoy Land Co. and Scarritt,* 101 S. W. (2d) 763; *Sovereign Camp Woodmen of the World* v. *O'Neill,* 266 U. S., l. c. 297. Said acts rendered respondents liable under the Civil Rights Acts by reason of said obstruction of justice.

IX.

The "sound judicial discretion" specified in Rule 38 of this Court, and which this Court holds governs it in the granting of writs of certiorari, entitles petitioner, under the applicable law and the facts in this case, to said writ of certiorari as a matter of right, and not of discretion or

grace, in accordance with Chief Justice Marshall's definition of judicial discretion in *Osborn et al.* v. *Bank of United States,* 9 Wheat. 738, where he said, l. c. 866:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law."

X.

Since judicial power of the United States, and especially the appellate jurisdiction of this Court, is vested in it by the Constitution and not by act of Congress, and since the only power vested in Congress by Clause 18, Section 8, Article I, is to enact laws to enable this Court to exercise the jurisdiction so vested in it by the Constitution, then Congress did not have power to delegate its legislative power to this Court, nor could Congress authorize this Court to exercise its discretion as to whether or not it would take jurisdiction of this case, since the Constitution itself vested appellate jurisdiction in this Court, and at the same time entitled petitioner to invoke it (*Durousseau* v. *United States,* 6 Cranch. 307, l. c. 313-314).

XI.

Commerce Trust Company, as a representative of the state, offered in evidence its untrue Exhibit No. 8 (R. 23) in support of a claim in favor of the John Moffett estate, which is shown by his own signatures in writing (R. 417, 419) never to have had any basis in fact, and depriving petitioner of her majority interest in said Moffett Brothers Kansas and Oklahoma properties, in violation of the due process provision of the XIVth Amendment, and of Clause 1, Section 2, Article IV, of the Constitution, and of the Civil Rights Act of April 9, 1866, under the law declared in ***Mooney*** **v.** ***Holahan,*** 294 U. S. 103.

XII.

Since the question as to whether or not the judgments of the District Court of Harper County, Kansas, were void has been settled against respondents by the decision of the Supreme Court of Missouri in 345 Mo. 741-751; and since said decision was pleaded as *res judicata* (R. 25) and the record in connection with it filed in the District Court (R. 37-50, 692-701); and since said record discloses that the Supreme Court of Missouri found that Commerce Trust Company and its attorney, Mr. Howard, represented conflicting interests so that the resulting judgment entries were void, both under the laws of Kansas, Missouri and the United States, then it is conclusively established that petitioner is entitled to recover under the Civil Rights Act against respondents as a matter of law. The failure of the Court of Appeals to give effect to the pleaded (R. 25) and proven (R. 692-701) judgment of the Supreme Court of Missouri renders its decision herein in direct conflict with the opinion of this

Court on this identical question in *Cooper* v. *Newell*, 173 U. S. 555, l. c. 566-567.

Therefore, since the Federal Rules of Civil Procedure in Rule 1 requires that the proceedings of the District Court shall be brought to a conclusion as speedily and inexpensively as possible; and since Rule 12 (b) (6) contained a command to the District Court to dispose of the case as on a motion for summary judgment under Rule 56; and since said District Court failed to comply with said rules and the Court of Appeals has approved that action; and since respondents have kept this vexatious and groundless litigation on the dockets and these estates unadministered for nearly 24 years, it is respectfully submitted that this Court, in this instance, apply the same principle applied to the Supreme Court of Missouri in *Magwire* v. *Tyler*, 17 Wall. 253-294, when it found that the Supreme Court of said State did not apply the federal law to the rights of the litigants, this Court itself ended the litigation by itself rendering a decision disposing of the entire controversy.

Petitioner respectfully invokes the application of that sound principle to end this litigation as it applied it to end that case.

WHEREFORE, your petitioner prays that a writ of certiorari under the seal of this Court directed to the United States Court of Appeals for the Eighth Judicial Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Eighth Circuit and of the case numbered and entitled on its docket No. 14,115 Civil, Louise McGrew Moffett as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, Appellant, v. Commerce Trust Company, a Corporation, Helen Weede, Orlin A.

Weede, B. C. Howard, William H. Kopp and R. E. Copman, Appellees, to the end that said cause may be reviewed and determined by this Court as provided for by the Constitution and laws of the United States, and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated May 24, 1951, at Kansas City, Missouri.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner,*

By MARTIN J. O'DONNELL,
Attorney for Petitioner.

APPENDIX.

Statutes Involved.

United States Code, Title 8.

"Section 41. Equal rights under the law
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R. S., Sec. 1977."

"Section 42. Property rights of citizens
All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. R. S., Sec. 1978."

"Section 43. Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S., Sec. 1979."

"Section 47. Conspiracy to interfere with civil rights
"Obstructing justice; * * *
"(2) * * *
"if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State

or Territory, with intent to deny to any citizen the equal protection of the laws, * * *

"Depriving persons of rights or privileges

"(3) If two or more persons in any State or Territory conspire * * * for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or

if one or more persons engaged in any such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R. S., Sec. 1980."

"Section 48. Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 47 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; * * * R. S., Sec. 1981."

"Section 49a. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of chapter 3 of Title 8, for the protection of all persons in the United States in their civil rights, and for

their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. * * * R. S., Sec. 722."

Constitutional Provisions Involved.

Article IV, Section 2, Clause 1.

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

(R. 6, 21, 308.)

Amendment XIV, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article III, Treaty With France
April 30, 1803.

(R. 4)

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States and

admitted as soon as possible according to the principles of the federal constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; * * *"

Missouri Partnership Administration Statutes.

(Revised Statutes, 1939)

Section 87.

"Every surviving partner, on the demand of any administrator or executor of a deceased partner, shall exhibit to the appraisers the partnership property belonging to the firm at the time of the death of such deceased partner, for appraisement; and in case the administration thereof shall devolve on such administrator or executor, the said survivor shall surrender to him, on demand, all the property of such partnership, including their books and papers, and all necessary documents pertaining to the same, and shall afford him all reasonable information and facilities for the execution of his trust. R. S., 1929, Sec. 87; 1919, Sec. 86."

Section 88.

"Every surviving partner who shall neglect or refuse to comply with the provisions in the last two preceding sections may be cited for such neglect or refusal before the proper court; and unless he comply with such provisions, or show sufficient cause for his omission, the court may commit him to the common jail of the county, there to remain until he consent to comply, or is discharged by due course of law. R. S., 1929, Sec. 88; 1919, Sec. 87."

Kansas Statute of Wills.

R. S. Kan., 1923 and 1935.

Section 22-201.

"Any person of full age and sound mind and memory, having an interest in real or personal property of any description whatever, may give and devise the same to any person by last will and testament lawfully executed, subject nevertheless to the rights of creditors and to the provisions of this act."

Section 22-238.

"No man while married shall bequeath away from his wife more than one-half of his property, nor shall any woman while married bequeath away from her husband more than one-half of her property. But either may consent in writing, executed in the presence of two witnesses, that the other may bequeath more than one-half of his or her property from the one so consenting."

Section 22-239.

"Any married person having no children may devise one-half of his or her property to other persons than the husband or wife."

Section 22-241.

"A will shall be revoked by the testator tearing, canceling, obliterating or destroying the same with the intention of revoking it, by the testator himself, or by some person in his presence or by his direction, or by some other will or codicil in writing executed as prescribed by this act, or by some other writing signed, attested and subscribed in the manner provided by this act for the making of a will; but nothing herein contained shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."

INDEX.

PAGE

Statement 1

Argument 12

I. The decision of the Court of Appeals that the void judgments in the proceedings wherein the state courts were without jurisdiction are not void, but only erroneous, conflicts with the decisions of all the other circuits, and the courts of Missouri, Kansas and England, thus necessitating the issuance of the writ under the sound judicial discretion of Rule 38..... 12

II. The Court of Appeals has erroneously decided that state court action is immunized from the operation of Section 1 of the XIVth Amendment, and of Clause 1, Section 2, Article IV of the Constitution, and the Civil Rights Acts, and thereby rendered a decision in conflict with the decisions of this Court, and the Courts of Appeals of other Circuits..... 21

III. Petitioner, as a citizen of Missouri in Kansas and Oklahoma, was denied the rights secured to her by Article IV, Section 2, Clause 1, of the United States Constitution; and, as a citizen of the United States, by the Civil Rights Act of April 9, 1866, particularly that part thereof embodied in Section 42, Title 8, U. S. C.; and therefore the complaint alleges a claim on which relief should be granted against respondents without reference to the XIVth Amendment..... 24

IV. Petitioner is entitled to certiorari under Rule 38, paragraph 5, of this Court, because the decision of the Court of Appeals is in conflict with the decisions of three Courts of Appeals of other circuits on the same matter..... 29

PAGE

V. The acts of Commerce Trust Company injuring petitioner and testator were done by it under color of state law, to-wit: as an executor and administrator of the State of Missouri claiming power by virtue of an appointment under the statutes of the State of Missouri, and because of its own misappropriation, and permitting others to misappropriate, the property of testator and petitioner, which rendered it and its confederates liable under the provisions of Section 43, Title 8, U. S. C.....31

VI. The language (Pro. 11), "But assuming that the state court proceedings were not within the jurisdiction of the courts which decided them * * * they were not void but, at most, erroneous" is a statement in direct conflict with the law as declared in the decisions of this Court, and all the other courts of appeals, and all the courts in the Anglo-Saxon world.....43

VII. The Court of Appeals erroneously affirmed the failure of the District Court to comply with the provisions of Rules 1 and 12 (b) (6) of the Rules of Civil Procedure, in that after said District Court had authorized the filing of matter and material outside the pleading for nearly two years—establishing petitioner's right to denial of respondents' motions for summary judgment—yet, without excluding same, the court dismissed the case on the theory that the complaint failed to state a cause of action.....44

VIII. The Kansas Statute of Wills, authorizing a bachelor to make his will and preventing revocation thereof by his marriage and death without children, rendered the judgments awarding his widow one-half of his estate in Kansas void.....47

IX. Commerce Trust Company became executor and administrator of the Moffett estates in consideration of its act in preparing John Moffett's will, an act made a misdemeanor by the Missouri statutes. All proceedings by it in said offices are therefore void.....50

X. Sections 87 and 88, R. S. Mo., 1939, enacted in 1845, were mere legislative decrees, void under the due process provisions of the Vth and XIVth Amendments. Said Vth was still functioning, as to Missouri legislation, by virtue of Article III of the Treaty with France of April 30, 1803.....51

XI. Under the allegations of the complaint and the law applicable thereto, the exercise of the sound discretion embodied in Rule 38 of this Court necessitates the granting of the writ prayed for.....54

XII. Since the jurisdiction of this Court is vested by the Constitution, and not by any Act of Congress, this Court is without jurisdiction to refuse the performance of its constitutional duty by the exercise of its own discretion.....56

Cases Cited.

Balzac v. Porto Rico, 258 U. S. 298, 309.....51
Bank v. Dowdy, 175 Mo. App. 478, 482.....37
Bank of Seneca v. Morrison, 200 Mo. App. 170, 178.....37
Bigelow v. Forrest, 9 Wall. 339.....43, 49
State ex rel. v. Bird, 253 Mo. 569, 583-584.....32
Boyd v. Nebraska, 143 U. S. 135.....53
State ex rel. v. Bradbury, 123 Kan. 495, 256 Pac. 149....18
Brandenburger v. Puller, 266 Mo. 534, 540.....38
Brown v. Fletcher's Estate, 210 U. S. 82.....37
In re Buder, 358 Mo. 796, 217 S. W. 2d 561.....10

PAGE

Buder v. Fiske, 174 F. 2d 260, 267 10
State ex rel. Burnes Nat'l Bank v. Duncan, 302 Mo. 130, 139 33
Butcher v. United Electric Coal Co., 174 F. 2d 1003 45
Byers v. McAuley, 149 U. S. 608 35

Carter v. St. A. B. R. Co., 338 U. S. 430, 438 ..... 12, 63
Catlette v. United States, 132 F. 2d 902 ..... 11, 39
Charles v. White, 214 Mo., l. c. 208 43
Clevinger v. Figley, 68 Kan., l. c. 707 49
Cohens v. Virginia, 6 Wheat. 264, 265, 404, 377 ..... 64, 68
Commerce Trust Company v. Ellis, 258 Mo. 702, 706-707 35
Compania de Remoque y Salvamento v. Esperance, Inc., 187 F. 2d 114, 117 45
Culp v. United States, 131 F. 2d 93 11

Darr v. Burford, 339 U. S. 200, 223, 227-228 ..... 56, 63
Defense Supplies Corp. v. United States Lines Co., 148 F. 2d 311, 312 19
Dixon's Executors v. Ramsey's Executors, 3 Cranch. 319, 323-324 36
Doe a of White v. Barford, 4 M. & S. Rep. 10, 12 48
Dorr v. United States, 195 U. S. 138, 146 57
Dred Scott v. Sanford, 19 How. 393-633 53
Duchess of Kingston's Case, 20 Howell's State Trials 412 42
Durousseau v. United States, 6 Cranch. 307, 313-314 58

Elliott v. Peirsol, 1 Pet. 328, 340 ..... 15, 16
Emmons v. Gordon, 140 Mo. 490, 498 36
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 79 66

Fenwick v. Sears' Administrators, 1 Cranch. 259 36
Fithian v. Monks et al., 43 Mo. 502, 521 16

Globe & Rutgers Fire Ins. Co. v. Hines, 273 Fed. 774, 777 19
Gray v. Clement, 286 Mo. 100, 109; s. c. 296 Mo. 497 ..... 43, 49
Griffith v. Frazier, 8 Cranch. 9 52

PAGE

Hardyman v. Collins, 183 F. 2d 308....8, 22
Helme v. Buckalew, 229 N. Y. 668....20
Hindson and Kersey....68
Hurd v. Hodge, 334 U. S. 24, 30-31, 32....11, 24, 28

Ingersoll v. Coram, 211 U. S. 335, 361-362....36
Ingle v. Jones, 9 Wall. 486, 495....36
In re Irwin's Estate, 123 Mo. App. 508, 512, 513....37

Johnson v. Beazley, 65 Mo. 250....52
Johnson v. Powers, 139 U. S. 156, 159, 162....56

Kansas City v. Mullins, 209 S. W. 558....43
Kelly v. R. F. C., 172 F. 2d 865....45
Knoop v. Anderson, 71 F. Supp. 832-852....14
Ex parte Lange, 18 Wall. 163....43
Leakey Adm. v. Maupin, 10 Mo. 368, 370....31

Manning v. Ketcham, 58 F. 2d 945....43
Marbury v. Madison, 1 Cranch. 137, 163, 166....40, 41
Martin v. Hunter's Lessee, 1 Wheat. 332-333....61
Maryland v. Baltimore Radio Show, 338 U. S. 912, 918....63
Mastin v. Gray, 19 Kan. 458, 462-463....16
Maxey v. Bell, 41 Ga. 183....32
Maxwell v. Bugbee, 250 U. S. 524, 537....18
McMaster v. Gould, 240 N. Y. 379, 794, 795....20
McShane v. Maldovan, 176 F. 2d 1016, 1019, 1021, 1022, 1023....11, 21, 22, 30
State to use Miller's Adm'r v. Bidlingmaier, 26 Mo. 483....2, 17
State ex inf. Miller v. St. Louis Union Trust Co., 335 Mo. 845, 860....50
State to use Mueller's Adm'r v. Reinhardt, 31 Mo. 95..2, 17
In re Moffett Brothers Partnership Estate, 345 Mo. 741, 750, 751....5, 14
National Bank of Topeka v. Mitchell, 118 Pac. 2d 519, 154 Kan. 276....13, 37, 43
O'Donoughue v. Boies, 159 N. Y. 87, 98, 100....43
Osborn v. Bank, 9 Wheat. 738, 866....54
Oscanyan v. Winchester Arms Co., 103 U. S. 261....50
Oyama v. California, 332 U. S. 633-689....24

PAGE

Panama Refining Co. v. Ryan, 293 U. S. 388, 421.....57, 59
Pennoyer v. Neff, 95 U. S. 714.....33
In re Petition of Mulford, 217 Ill. 242, 246, 247, 248, 249.....33, 35
Peyton v. Chase County Nat'l Bank, 124 Kan. 763, 766.....18
Phoenix Ins. Co. v. Erie Transportation Co., 117 U S. 312, 322.....18
Picking et al. v. Pennsylvania R. Co., 151 F. 2d 240, 248-249, 249-250.....11, 21, 22, 29, 30, 31, 38

Revere v. Revere, 133 Kan. 300, 302-303.....49
Richardson v. Busch, 198 Mo. 174, 183-184.....37
Riemann v. Riemann, 124 Kan. 539, 542.....48
Riley v. New York Trust Co., 315 U. S. 343, 354.....32
Rio Grande Irrig. & C. Co. v. Gildersleeve, 174 U. S. 603, 606, 608, 609-610.....46
Rose v. Himely, 4 Cranch. 421.....52

Schechtman v. Foster, 172 F. 2d 339.....56, 63
Schippel v. Jennerson, 169 Kan. 151.....49
Scott v. McNeal, 154 U. S. 34.....52
Screws v. United States, 325 U. S. 91.....22, 23, 38, 39
Shelley v. Kraemer, 334 U. S. 1, 11, 17, 18.....21, 22, 28, 43
Shorten v. Judd, 60 Kan. 75.....47
Sibbach v. Wilson, 312 U. S. 1, 13, 14.....45, 46
Southland Gas Co. v. Bayley, 319 U. S. 44, 47.....38
Stacy v. Thrasher, 6 How. 44, 60.....36
State ex rel. Stormfeldz, 72 F. 2d 595.....9
State v. Julow, 129 Mo. 163.....39
State v. Wood, 23 N. J. L. 560, 564.....54
Swift v. Tyson, 16 Pet. 1.....65

United States v. Baldi, 96 F. Supp. 100.....56
United States v. J. C. Williams et al., No. 26, October Term, 1950.....27
United States v. Manton, 107 F. 2d 834.....41
United States v. Trierweiler, 52 F. Supp. 4.....11, 39
United States v. Waddell, 112 U. S. 76, 77.....26, 27
United States v. Walker, 109 U. S. 258.....49
Ex Parte United States, 242 U. S. 27, 51-52.....65

PAGE

Valle v. Stengel, 176 F. 2d 692, 702.....11, 30
Vanek v. Vanek, 104 Kan. 624.....47, 49
Vaughan v. Northrup, 15 Pet. 1, 6.....36

Wayman v. Southard, 10 Wheat. 1, 43-44.....59
Weil v. Neary, 278 U. S. 160, 169-170.....46, 47
Wilcox v. Horan, 178 F. 2d 162, 165.....35
Williams v. United States, No. 365, October Term, 1950.....28, 38
Windsor v. McVeigh, 93 U. S. 274.....43, 49

Yager v. Liberty Royalties Corp., 123 F. 2d 44.....18

Statutes Cited.

Amendment V, U. S. Constitution.....51
Amendment XIV, U. S. Constitution.....1, 6
Article III, Section 2, Par. 2, U. S. Constitution.....12, 56, 57, 58, 60
Article III, Treaty with France, April 30, 1803.....51, 53
Article IV, Section 2, Clause 1, U. S. Constitution.....1, 6, 18, 21, 26
Article IV, Section 3.....57
Kansas Statute of Wills.....(Appendix to Petition)
Laws Missouri 1915, p. 99.....50
Laws Missouri 1949, p. 506, Sec. 44, p. 521.....52
Laws, Missouri, 1949.....52
Statute, England, 42 Ed. III, 3 c. i.....14
Sections 1254, 2101 (c) and 2106, Title 8, Judicial Code.....60, 62
Sections 41, 42, 43, 47, 48 and 49a, Title 8, U. S. C.....1, 26
Sections 41 and 42, Title 8, U. S. C.....6, 28
Section 42, Title 8, U. S. C.....24, 27
Section 43, Title 8, U. S. C.....31
Sections 43 and 47, Title 8, U. S. C.....22, 38
Section 49a, Title 8.....15, 37, 42
Section 645, R. S. Mo., 1939.....15
Section 5508, R. S. U. S.....26
Section 2106, Title 28, R. S. U. S.....12, 60, 68

PAGE

Section 242, Title 18, U. S. C.....11
Section 20, Federal Criminal Code.....38
Section 8026, R. S. Mo., 1939.....37
Section 11, 801, R. S. Mo., 1919 (now Sec. 363.200, R. S., 1949).....33
Sections 22-201, 22-238, 22-240, R. S. Kan., 1923, 1935..6, 47
Sections 87 and 88, R. S. Mo., 1939.....51

Texts Cited.

Blackstone, Com. Book 3, 256.....41
Sohm's Institutes, 2d Ed., p. 482.....48
Burdick's Principles of Roman Law and Their Relation to Modern Law, p. 572.....48
Woerner's American Law of Administration, 3rd Ed., 671, Par. 10, p. 10.....35

Miscellaneous.

Civil Rights Act, April 9, 1866.....6, 28
Coke's Comment on Chapter 19, Westminster II.....36
Coke's Institutes, Part Two, 56, 527.....15, 67
Case of the Marshalsea.....43
George Gordon's Apostrophes to Napoleon.....53
Rules Civil Procedure.....46
Rule 12 (b) (6), Rules Civil Procedure.....13, 44, 45
Rules 1 and 12 (b) (6), Rules Civil Procedure....44, 45, 46
Rule 38, Rules Supreme Court, Par. 5....12, 21, 23, 29, 54, 55

In the Supreme Court of the United States

No. .....

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Respondents.*

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

The complaint shows that this case arises under Article IV, Section 2, Clause 1, and Section 1 of the XIVth Amendment to the United States Constitution, and under Sections 41, 42, 43, 47, 48 and 49a, Title 8, U. S. C.; and that respondents were parties to a conspiracy, with others exercising state power, in pursuance of which they fraudulently made use of legal proceedings to deprive Thomas S. Moffett and petitioner of their properties in violation of said provisions of the Constitution and laws.

The Court of Appeals having held that the complaint failed to state a cause of action (Pro. 8) or claim on which relief could be granted, in the interest of brevity, without reproducing its allegations, said complaint (R. 2-33, with Exhibits "A" to "K," R. 33-72) is made a part of this statement.

Additional facts are stated in motions to amend (R. 237-240, 307-308) said complaint and a supplemental complaint (R. 278-290) with Exhibits "A," "B," "C" and "D" (R. 291-307), none of which were ruled on.

The conspirators aided and abetted each other (R. par. 31, p. 17) in the commission of the overt acts. On application of Commerce Trust Company (R. 18-19) a Missouri "special" probate judge appointed it as executor of one estate and administrator of two partnership estates, the interests of which were in conflict, for the purpose of enabling (R. 4) Commerce Trust Company in one capacity to prosecute groundless claims (R. 9-14) against itself in other capacities, and thereby to unlawfully deprive petitioner of the property devised and bequeathed to her. Said appointment was in December, 1928 (R. 4, 111) after said "special" probate judge revoked the letters testamentary of Thomas S. Moffett on the ground that the same person was not qualified to represent estates with conflicting interests (R. 4). Said order appointing the same person so to do was a nullity (*State to use Miller's Adm'r* v. *Bidlingmaier*, 26 Mo. 483; *State to use Mueller's Adm'r* v. *Reinhardt*, 31 Mo. 95, affirming 26 Mo., cited to this hour).

Though sufficient assets were in Missouri to satisfy the unfounded claim (R. 24), had it been valid, Commerce Trust Company, knowing that it could not get it enforced in Missouri, and knowing that Thomas S. Moffett had retained a local counsel who was unpopular with the state

district judge, proceeded to his court 310 miles from the domicile of all the parties and intervened in said conflicting capacities (R. 18-19) in the District Court of Harper County, Kansas, to prosecute said unfounded claim in favor of an estate of which it claimed to be executor, and against itself as claimed administrator of another estate in Missouri. The district judge of said county, over objection, permitted said intervention, and permitted Mr. Howard as its attorney, to prosecute said claim for Commerce Trust Company as executor against Commerce Trust Company as Missouri administrator (while he represented it in both conflicting capacities), though it had neither title to nor possession of any assets (R. 19, 20, 21, 69) of said estates, nor any appointment as administrator thereof in Kansas, as admitted by Commerce Trust Company (R. 69) when it stated:

> "This contention, which is the very core of plaintiff's case, is that the Kansas judgments were void because Commerce Trust Company, administering the partnership estate of Moffett Brothers, intervened in the Kansas litigation without having title to or possession of any assets of that partnership in the State of Kansas."

Said state district judge, over objection, permitted Commerce Trust Company, by and with the aid of the other respondents, to prosecute said claim, and said state district judge approved a void judgment entry of March 5, 1932 (R. 115-139) for $143,829.96 (R. 20) against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership, and in favor of the John Moffett estate (R. 122), of which Commerce Trust Company claimed to be executor *de bonis non.*

Said judgment entry included a judgment for $101,228.06 (R. 21, 130) against the Oklahoma administrators of an

estate with assets in Oklahoma, notwithstanding said Oklahoma administrators were not parties as such in said District Court in Kansas and there was no property of said estate in Kansas (R. 21). So that the judgments entered were void.

The void judgment entry against Commerce Trust Company, as a Missouri administrator, was based upon the unfounded claim that John Moffett owned 5,530 acres in Chase and Morris counties, Kansas, known as the Hymer Ranch (R. 26), and that he loaned $98,925.00 (R. 143) and other sums to Moffett Brothers partnership, whereas said sums did not belong to John Moffett but aggregated the sale price of the Hymer Ranch owned, not by John Moffett but by Moffett Brothers and Andrews partnership at the time, whose obligations were discharged from said sums, whereas his own signature attached to financial statements (R. 417, 419), and letters (R. 190-194), and a statement of Helen Weede's in writing (R. 155-156), established that he never owned same, as shown by the admitted allegations in paragraph 48 (R. 26-27). The facts as to John Moffett's lack of ownership were fraudulently misrepresented to and concealed from petitioner and testator (R. 144).

Nevertheless, to satisfy said judgment, 8,080 acres of Kansas land (R. 22) and 17,000 acres of Oklahoma land (R. 31, 71), in which petitioner owned a majority interest, were misappropriated to satisfy the said void judgment based on said unfounded claim in favor of the John Moffett estate against Moffett Brothers partnership estate.

Commerce Trust Company, in violation of the law of Missouri limiting its activities as executor and administrator to Missouri, became a trespasser by appearing in other states and misappropriating the assets in such states, in violation of the laws of Missouri and said states.

As a basis, it did so pursuant to void orders obtained by it from the probate court (R. 3-4, 540) of Jackson County, Missouri, and from the district court of Harper County, Kansas. And, in violation of the law, undertook to execute deeds (R. 526-560) pursuant to such void orders, conveying assets into the estate of John Moffett of which it was executor to satisfy void judgment entries against it as Missouri administrator of Moffett Brothers partnership estate.

The Supreme Court of Missouri (after the overt acts had been completed in Kansas), in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751, found that Commerce Trust Company, from start to finish, represented conflicting interests in said litigation (R. 37-50, 692-701) and that Mr. Howard likewise represented Commerce Trust Company in its conflicting capacities in said litigation (R. 699, 701), and that Commerce Trust Company paid Mr. Howard $6,000.00 (R. 25-26, 700-701) for his loyalty to it in one capacity and his disloyalty to it in another in denuding Moffett Brothers partnership estate of its assets, and caused same to be conveyed into the estate of John Moffett, of which Commerce Trust Company was executor.

The overt acts which finally sacrificed said properties and petitioner's interest were credit entries (R. 22) on said void judgment.

Said district judge, sitting in Kansas, without jurisdiction so to do, entered a decree purporting to partition said Oklahoma lands (R. 71, 370-396) for the purpose of misappropriating same by means of his void orders.

John Moffett became Mrs. Weede's husband on February 22, 1921 (R. 354) after he had, on the preceding day, executed his last will (R. 109-110) while still a bachelor. He thereafter died without any child or children

(R. 17), after having devised $5,000.00 (R. 109) to Mrs. Weede, whose name was then Mustard.

By virtue of the Kansas statute of wills, the will of John Moffett was not revoked by his marriage and death without children. So that Mrs. Weede was never entitled to any interest in his estate in Kansas, save that which he bequeathed her, and which she rejected (R. 17).

Nevertheless, on the unfounded assumption that Mrs. Weede was entitled to a one-half interest in John Moffett's estate, the Kansas courts awarded the properties of Thomas S. Moffett and petitioner to Mrs. Weede, in violation of the laws of Kansas, Secs. 22-201, 22-238, 22-240, R. S., 1923.

By the foregoing overt acts, and others alleged in the complaint, petitioner, as a citizen of Missouri, was deprived of the rights guaranteed to her by Clause 1, Section 2, of Article IV of the Constitution of the United States (R. 6, 21, 308), and deprived of the rights guaranteed to her by the provisions of Section 1 of the XIVth Amendment to the Constitution and, as a citizen of the United States, by the Civil Rights Act of April 9, 1866, now Sections 41 and 42, Title 8, U. S. C.

Respondents, between July 14, 1928 (R. 16), and December 23, 1931 (R. 9), instituted 14 groundless suits and claims against petitioner's interest for sums approximating $5,000,000.00 (R. 9), most of which have never been tried, but are still pending on the dockets, over petitioner's attempts to have them terminated (R. 13), in violation of the constitutions and laws of the states in which they were instituted, and by said delay preventing distribution of her testator's estate, depriving her of her property without due process of law, in violation of said federal constitutional provisions.

Many other overt acts are alleged but not restated here, for the reason that they appear in the complaint. And

the truth of the allegations is established by the matters and materials outside the pleadings permitted to be filed by the District Court, and not excluded by it, as well as by respondents' admissions.

The Court of Appeals, contrary to the law of Missouri and as declared by this Court, found that Commerce Trust Company was not an agent of the State of Missouri (Pro. 11) while acting as executor and administrator, and wholly ignored the admitted allegations showing actual knowledge of the law prohibiting appointment of Commerce Trust Company by the "special" probate judge of Missouri (R. 3-4) to administer estates in conflicting capacities; and like knowledge by the district judge of Harper County, Kansas (R. 18-19), establishing that they were parties to the conspiracy, and knowingly and purposefully committed the overt acts which resulted in petitioner's loss, and deprived petitioner of the rights secured and guaranteed to her by the Constitution and laws of the United States.

The Court of Appeals overlooked the nullifying effect of the decision of the Supreme Court of Missouri (345 Mo. 741-751), pleaded as *res judicata* herein (R. 25), which decision was rendered after futile appeals by petitioner to the Supreme Court of Kansas (R. 21), in which court Commerce Trust Company was permitted to represent both sides of the litigation, to-wit: Commerce Trust Company as executor of the estate of John Moffett, which estate was alleged judgment creditor (R. 20-21), against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate as alleged debtor. And after a futile appeal to the federal courts in Kansas (R. 699) to enjoin the enforcement of the judgment against the ancillary administrator of the John Moffett estate, not a party herein, and who never had or could have any title to such claim had it existed, which judg-

ments and opinions of said courts were pleaded by respondents as entitled to full faith and credit and as *res judicata* (R. 661) in said Supreme Court of Missouri, and which latter's nullifying decision (R. 25, 37-50, 692-701) conclusively established the fact that the court proceedings in Kansas as to Kansas and Oklahoma lands misappropriating the property devised and bequeathed to petitioner, were void.

The Court of Appeals, proceeding on the unfounded theory (Pro. 11) that no repository of state power was a party to the conspiracy, or a party to the overt acts aiding and abetting each other in denuding petitioner of her properties in violation of the Constitution, and upon the theory that the action was against private individuals only—notwithstanding the complaint alleged, and by their motions to dismiss respondents admitted that two state judges were parties to the conspiracy—called attention to the opinion in the court of appeals in *Hardyman* v. *Collins,* 183 F. 2d 308, and stated (Pro. 12):

> "Here the complaint fails to show that plaintiff has suffered or will suffer the deprivation of a federal right."

Whereas, petitioner's case is based upon the admitted allegations that the states of Missouri and Kansas through their agents, consisting of two state judges and two state executors and administrators, pursuant to the conspiracy, and by the overt acts aiding each other, the said conspirators misused the powers of said states, in violation of petitioner's federal rights.

The Court of Appeals also found that (Pro. 11):

> "* * * assuming that the state court proceedings were not within the jurisdiction of the courts which decided them, * * * they were not void but, at most, erroneous."

Whereas, under the laws of Missouri, Kansas and Oklahoma, and the decisions of this Court, and of the Court of Appeals for the Eighth Circuit itself, said judgments were utterly void, and especially according to the law declared by said Eighth Circuit in *State ex rel.* v. *Stormfeldz,* 72 F. 2d 595.

Among the groundless actions (R. 9-14) instituted by respondents, pursuant to the conspiracy, was a cause referred to in the record as No. 339,134 (R. 9, 13-14) praying $441,957.71, with interest at six per cent from September 1, 1930, instituted on October 25, 1930, against the partnership of Andrews, Lewis and Moffett by Commerce Trust Company as administrator of the partnership estate of Moffett Brothers and Andrews—of which partnerships T. S. Moffett and L. B. Andrews were then living members (R. 13). The defendant partnership was dissolved by the death of Thomas S. Moffett on December 22, 1930 (R. 6-7). The survivors (Andrews and Lewis) qualified as statutory administrators thereof in the probate court on January 5, 1931 (R. 282).

Said action, if any, survived against the surviving partners, and not against the estate of Thomas S. Moffett as deceased partner. Nor was it ever revived against said estate of Thomas S. Moffett (R. 282). Petitioner on 4 occasions sought to have same dismissed (R. 13), as required by the Missouri statutes, but Commerce Trust Company successfully opposed. About 20 years after institution of said groundless action respondents, through Commerce Trust Company, as a counter-irritant to this action, had the state court appoint a referee in said groundless action in February, 1950—after this cause was appealed to the Court of Appeals. Whereupon petitioner applied for an injunction against Commerce Trust Company to prevent it from interfering with the jurisdiction of the Court of Appeals to grant the relief sought

—which injunction was denied by the Court of Appeals on March 8, 1950, "in all respects" (R. 763). Facts stated in the motion to file (R. 278-279) the proposed supplemental complaint (R. 279-290 and Exhibits "A" to "D" 291-307), and therein, show that said relief should have been granted.

Amongst the overt acts of the conspirators was a secret conference between the Kansas state district judge and emissaries of Commerce Trust Company on February 22, 1932 (R. 183-184, 569, 594) at his home town 310 miles from the homes of said emissaries, concealed for 16 months, pursuant to which Commerce Trust Company became ostensible judgment creditor (R. 102, 114-115) for a total sum approximating $130,000.00, which were means utilized in accomplishing the misappropriation of petitioner's property.

The decision of the Court of Appeals approving the misconduct of Commerce Trust Company in violating the fiduciary obligations which it assumed to petitioner and to all others interested in the estates which it was engaged in administering, was a decision in direct conflict with the law of Missouri as stated in the proceeding of *In re Buder,* 358 Mo. 796, 217 S. W. 2d 561, l. c. 571, thus:

> "The fiduciary relationship of executor and legatees connotes trust and confidence. It contemplates good faith in all transactions rather than mere naked legal obligation. It comprehends integrity, loyalty, fidelity and trustworthiness more than it relates to credit or ability."

It is also in conflict with *Buder* v. *Fiske,* 174 F. 2d 260, l. c. 267, where Judge Stone, late Chief Judge of the Eighth Circuit, cites the Moffett case, 345 Mo. 741-751—which decision of the Supreme Court of Missouri was in conflict with the decision of the Court of Appeals in

approving the conduct condemned by the Supreme Court of Missouri.

As petitioner sought to recover under the provisions of the Civil Rights Act of 1866, as embodied in Sections 41 and 42, Title 8, U. S. C., her right to recover under the decision of this Court in *Hurd* v. *Hodge,* 334 U. S. 24-36, for violation of her rights under said Civil Rights Acts—operates to render the decision of the Court of Appeals in direct conflict with the decision of this Court in *Hurd* v. *Hodge*—thus bringing this case within the provisions, as to conflicting decisions, of paragraph 5 of Rule 38, necessitating the granting of the writ.

The decision of the Court of Appeals is also in direct conflict with the decision of three courts of appeals in other circuits, to-wit: *Picking et al.* v. *Pennsylvania R. Co. et al.,* 151 F. 2d 240 (C. A. 3); *Valle* v. *Stengel,* 176 F. 2d 692, 702 (C. A. 3); *McShane* v. *Maldovan,* 176 F. 2d 1016, 1021, 1022, 1023 (C. A. 6), on the question that persons conspiring with persons who are repositories of state power to deprive a citizen of the United States or any other person within their jurisdiction of their civil rights are liable to the party injured.

Said decision of the Court of Appeals is also in conflict with the opinion in *Culp* v. *United States,* 131 F. 2d 93 (C. A. 8); *Catlett* v. *United States,* 132 F. 2d 902 (C. A. 4); and *United States* v. *Trierweiler,* 52 F. Supp. 4, all holding that persons who conspire with persons exercising state power to deprive a person of his constitutional rights in violation of the constitutional provisions is liable under the provisions of Section 242, Title 18, U. S. C.—all of which conflicts should be settled in this proceeding, and settled in favor of petitioner.

ARGUMENT.

I.

The decision of the Court of Appeals that the void judgments in the proceedings wherein the state courts were without jurisdiction are not void, but only erroneous, conflicts with the decisions of all the other circuits, and the courts of Missouri, Kansas and England, thus necessitating the issuance of the writ under the sound judicial discretion of Rule 38.

An opinion in *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, l. c. 438, holds that this Court, in the exercise of the appellate jurisdiction conferred upon it by Section 2 of Article III of the Constitution, and by the Act of Congress embodied in Section 2106 authorizing it to exercise the same identical jurisdiction always exercised from the beginning of the Government, is governed not by said Constitution and Act of Congress but by said Rule 38. Said language is:

> "Where a case involves no general principle requiring pronouncement but merely its own unique circumstances, such alleviation is inconsistent with the criteria, set forth in Rule 38, governing this court's discretion in granting a writ of certiorari."

The opinion of the Court of Appeals reflects its erroneous and conflicting decision on the point here made. Its language as to this question is (Pro. 11):

> "* * * assuming that the state court proceedings were not within the jurisdiction of the courts which decided them, * * * they were not void but, at most, erroneous."

The state court proceedings thus referred to and alleged in the complaint, which allegations are conclu-

sively established by the matter and material filed under Rule 12 (b) (6) outside the pleadings—which was not excluded by the court—refers to the proceedings in which the void orders and judgment entries were made. The allegations and the proof establish same with reference to state proceedings and judgments without jurisdiction and refer to judgment entries of March 5, 1932 (R. 115-139), wherein the entry purports to show a judgment against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate and in favor of the John Moffett estate of which it was executor for $143,829.96; and an entry for $101,228.06 against the Oklahoma administrators of a partnership estate in Oklahoma—in neither of which instances were there any assets of said estates being administered by said Missouri and Oklahoma administrators within the jurisdiction of said district court of Harper County, Kansas—nor in the State of Kansas—but were in the states of which they purported to be administrators.

For which reasons said judgment entries were absolutely void and complete nullities, under the law as declared by the Supreme Court of Kansas in *National Bank of Topeka* v. *Mitchell,* 118 Pac. 2d 519, l. c. 522-523, 154 Kan. 276, 281-282, citing and following numerous decisions of this Court, and those of other circuit courts of appeals:

> "Appellee cites numerous authorities which support the principles above stated. We add only a few among the countless others which might be cited: *Rose* v. *Himely,* 4 Cranch. 241, 277, 2 L. Ed. 608, 619; *Pennoyer* v. *Neff,* 95 U. S. 714, 722, 24 L. Ed. 565, 568; *Frick* v. *Commonwealth of Pennsylvania,* 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316; 11 Am. Jur. 296-298; Restatement, Conflict of Laws, sec. 512 (b); 11 R. C. L. 450, 451, sec. 555; *Burrowes* v. *Goodman,* 2 Cir., 50 F. 2d 92, * * *"

"The case of *Brown* v. *Fletcher's Estate,* 210 U. S. 82, 52 L. Ed. 966, cited by appellee, applies the broad principles above stated to a situation fully in line with the one before us. To quote pertinent passages therefrom would unduly prolong the opinion. We call particular attention to the quotation therein from Chief Justice Marshall's opinion in *Rose* v. *Himely, supra,* and to what was said in *Pennoyer* v. *Neff, supra,* as quoted in *Brown* v. *Fletcher* in 52 L. Ed., at page 970.

"We conclude that the trial court was without jurisdiction to revive the action against the Oklahoma executor.

"The judgment is affirmed."

The exhaustive opinion in *Knoop* v. *Anderson,* 71 F. Supp. 832-852, on the question of the rendition of judgments by a state court against a nonresident executor or administrator includes the countless authorities referred to by the Supreme Court of Kansas in the above opinion. The said judgment entry against Commerce Trust Company as administrator of Moffett Brothers partnership, and in favor of the John Moffett estate of which it was executor—and prosecuted by it through the same attorney —has been also conclusively established to be void by the decision of the Supreme Court of Missouri in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751.

The fundamental law of England on this question was enacted by its Parliament in the year 1297, 42 Ed. III, 3 c. i., which statute provides:

"And we will, that if any judgment be given from henceforth contrary to the points of the charters aforesaid by the justices, or by any other our ministers that hold plea before them against the points of the charters, it shall be undone, and holden for nought."

In Part Two Coke's Institutes 527 his comment is

> "Whatsoever judgment is given against the statute of Magna Charta, * * * is made void by this act, * * *"

Said English statute is made part of the common law of Missouri, and made applicable herein by Section 49a, Title 8, U. S. C.

The Missouri statute, Section 645, R. S. 1939, provides that:

> "* * * all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this State, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, * * *"

Said decision as represented in said declaration by said Court of Appeals conflicts with Section 1 of the XIVth Amendment and all the provisions thereof.

The conflict of the decision of the Court of Appeals with the decisions of this Court, and the courts generally, is emphasized by the classic declaration on this subject by this Court in *Elliott* v. *Peirsol*, 1 Pet. 328, l. c. 340:

> "Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in

> opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

It follows that the district judge of the Harper County court, Commerce Trust Company, B. C. Howard and Orlin A. Weede, who were concerned in executing such judgments or sentences in this case are trespassers within the meaning of the law, and liable to petitioner on this ground alone. And, since the acts of the accountants and Mrs. Weede cooperating with them, pursuant to the conspiracy, occasioned the loss, then they are likewise liable.

The Supreme Court of Kansas emphatically recognized the force of the above opinion in *Elliott* v. *Peirsol,* 1 Pet. 328, which authority, with many others, was cited in *Mastin* v. *Gray,* 19 Kan. 458, l. c. 462-463, where it was held that under said authorities

> "• • • any judgment rendered without jurisdiction may be impeached in any proceeding; and that in so doing, anything contained in the record purporting to give or prove such jurisdiction • • • may be impeached and contradicted by any evidence, extrinsic as well as intrinsic, and may be shown to be true or false. *Elliott* v. *Peirsol,* 1 Pet. 328."

The Missouri court in *Fithian* v. *Monks et al.,* 43 Mo. 502, l. c. 521, reads:

> "The law in regard to void and voidable judgments has been examined and laid down by the Supreme Court of the United States in a series of well-considered decisions. (*Vorhees* v. *Bank of U. S.,* 10 Pet. 474; *Elliott* v. *Piersol,* 1 Pet. 340; *Hickey* v. *Stewart,* 3 How. 750; *Shriver* v. *Lynn,* 2 How. 43.) In *Vorhees* v. *Bank of U. S.,* Mr. Justice Baldwin said: 'If not warranted by the constitution or law of

> the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law which can properly be deemed to have been done *coram non judice*—that is, by persons assuming the judicial function in the given case without lawful authority.' So, in *Shriver* v. *Lynn, supra,* it is declared that a sale ordered by a court in a case where it had not jurisdiction must be considered as inadvertently done, or an unauthorized proceeding, and in either branch of the alternative as a nullity."

The State of Missouri through its "special" probate judge made a void order appointing Commerce Trust Company to represent estates the interests of which were in conflict, immediately after having revoked the letters testamentary granted to Thomas S. Moffett by the duly elected judge, on the ground that the interests of said estates were in conflict. Thus knowingly and purposefully denying the equal protection of the laws and due process of law, and discriminating in favor of Commerce Trust Company and its confederates (*State to Use Miller's Adm'r* v. *Bidlingmaier,* 26 Mo. 483; *State to Use Mueller's Adm'r* v. *Reinhardt,* 31 Mo. 95).

In the first case cited the Missouri Supreme Court said, l. c. 485:

> "There is no other mode of treating such irregularities than by regarding the proceedings in which they occur as nullities."

In the second case cited, the Missouri court in syllabus 1 said:

> "1. Where the interests of two estates in course of settlement conflict—as where there is a demand in behalf of one estate to be presented for allowance against the other—the same person cannot act as the administrator of both parties in the matter of ob-

> taining an allowance of the demand; should a demand be allowed under such circumstances against one of the estates, the proceeding will be regarded as a nullity. (*State to Use, &c,* v. *Bidlingmaier,* 26 Mo. 483, affirmed.)"

The State of Kansas, through its district judge of Harper County, made void orders and void judgment entries with reference to properties in Kansas and Oklahoma, pursuant to which respondents were enabled to misappropriate all of Moffett Brothers lands in Kansas and Oklahoma, in which petitioner had a majority interest. And, by their acts and the institution of groundless suits, and maintaining suits on the dockets of the courts for over 20 years for approximately $5,000,000.00 against petitioner's interest destroyed the Moffett credit (R. 28) and occasioned the loss of some 30,000 additional Kansas acres—all of which was done pursuant to such void orders and judgments.

The Kansas law is identical with the above Missouri rule (*Peyton* v. *Chase County National Bank,* 124 Kan. 763, l. c. 766; *State ex rel.* v. *Bradbury,* 123 Kan. 495, 256 Pac. 149, and *Yager* v. *Liberty Royalties Corp.,* 123 F. 2d 44). Yet Kansas denied petitioner in violation of Secs. 41 and 42, Title 8, U. S. C.

> "• • • the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; • • •"

thus denying her privileges and immunities as a Missouri citizen guaranteed by Article IV, Sec. 2, Clause 1 (*Maxwell* v. *Bugbee,* 250 U. S. 524, l. c. 537) and by said Section 41.

So does this, and all Federal courts, apply the same rule as to conflicting interests (*Phoenix Ins. Co.* v. *Erie*

Transportation Co., 117 U. S. 312, l. c. 322; *Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, l. c. 777; *Defense Supplies Corp.* v. *United States Lines Co.*, 148 F. 2d 311, l. c. 312).

The finding of the Missouri Supreme Court decision that Commerce Trust Company and B. C. Howard represented conflicting interests in the Kansas courts (345 Mo. 741-751, l. c. 750, 751) (R. 48, 49, 699, 701) conclusively established that said judgments were void.

Other factors rendered the judgments against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate, and against the Oklahoma administrators of assets of a partnership estate located in Oklahoma, void. The facts alleged and admitted in the following quotation apply in both instances (R. 69):

> "The contention, which is the very core of plaintiffs' case, is that the Kansas judgments were void because Commerce Trust Company, administering the partnership estate of Moffett Brothers, intervened in the Kansas litigation without having title to or possession of any assets of that partnership in the State of Kansas.

Respectfully submitted,

JAMES E. GOODRICH,
EUGENE E. BOWERS,
HUGH M. HILLER,
Attorneys for Defendant Commerce Trust Company."

In *McMaster* v. *Gould*, 240 N. Y. 379, with the concurrence of Justice Cardoza, who delivered the opinion in *Helme* v. *Buckalew*, the following paragraphs state the applicable law, l. c. 794, 795:

> "The reasoning in *Helme* v. *Buckalew, supra*, clearly indicates that the law is unconstitutional as to foreign administrators. Following the leading case, consistency requires us to say that the statute registers a futile effort to bind foreign administrators by a judgment *in personam*, and as to them is unconstitutional in its inception. The foreign administrator as the official of another sovereignty exists only by virtue of the statute of another state, and has no legal existence in this state. (p. 794)
>
> "The concept of a foreign nonresident executor without assets in this state as present in his fiduciary capacity is as difficult as the discarded concept of a foreign corporation as present in this state merely because one of its directors is found here. *Riverside & D. River Cotton Mills* v. *Menefee*, 237 U. S. 189, 59 L. Ed. 910, 35 Sup. Ct. Rep. 579. Regarding the foreign executor as a trustee rather than as an owner, even his presence in the state as an individual does not imply his presence as executor unless assets in the state or other trust duties to be performed here make his presence an incident of his fiduciary capacity, and he must be present in the state as executor before judgment *in personam* can be entered against him.
>
> "To the suggestion that no harm would be done in allowing judgment to be entered in New York in all such cases, the answer is that the very act of fixing, without a hearing by judicial action, a sum due, would in and of itself be repugnant to the due process clause. *Riverside & D. River Cotton Mills* v. *Menefee, supra.*" (p. 795)

II.

The Court of Appeals has erroneously decided that state court action is immunized from the operation of Section 1 of the XIVth Amendment, and of Clause 1, Section 2, Article IV of the Constitution, and the Civil Rights Act, and thereby rendered a decision in conflict with the decisions of this Court, and the Courts of Appeals of other circuits.

Said decision of the Court of Appeals ignores the law stated by this Court in *Shelley* v. *Kraemer*, 334 U. S. 1, l. c. 18:

> "* * * it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for the exercise of this Court's power of supervision within the meaning of said language under Rule 38, paragraph 5 (b).

Both the District Court and Court of Appeals wrote opinions deciding that never in any instance can a litigant recover for loss sustained and occasioned by the acts of a state judge in depriving a citizen of the United States of his property without due process of law, or by a denial of the equal protection of the laws, in violation of the XIVth Amendment, or in violation of the rights of a citizen of one state in another state, included in the guaranty of the privileges and immunities described in Clause 1, Section 2, Article IV of the Constitution.

This decision was in direct conflict with the opinions in *Picking et al.* v. *Pennsylvania R. Co., et al.*, 151 F. 2d 240, and *McShane* v. *Maldovan*, 172 F. 2d 1016, and

Shelley v. *Kraemer,* 334 U. S. 1, l. c. 18, *supra,* and *Screws* v. *United States,* 325 U. S. 91.

In the Picking case, *supra,* l. c. 250, it is said:

> "Section 1 of the third Civil Rights Act explicitly applied to 'any person.' R. S. Section 1979 applies to 'every person.' We can imagine no broader definition. The statute must be deemed to include members of the state judiciary acting in official capacity."

In *McShane* v. *Maldovan* (C. A. 6), *supra,* the opinion of the court was written by one of the judges sitting by assignment in the ninth circuit in *Hardyman* v. *Collins,* 183 F. 2d 308, and recovery was sought under Sections 43 and 47, Title 8, U. S. C. The opinion recites, l. c. 1017:

> "Appellant brought her action in the district court, charging appellees with conspiring to obstruct and defeat the due course of justice in the State of Michigan, with intent to deny to her the equal protection of the laws, and for the purpose of depriving her of her right to be tried in accordance with due process of law. * * *
>
> In appellant's complaint she alleged that the conduct of the appellees was willful and malicious and designed to deprive her of her rights, privileges, and immunities as secured by the Fourteenth Amendment to the Constitution of the United States."

Citing and quoting from the Screws and Picking cases, *supra,* the court said, l. c. 1019:

> "The issue before us is whether a conspiracy entered into between state officers and others acting under color of state law to deprive a person of constitutional rights secured under the Fourteenth Amendment, and resulting in deprivation of such rights, gives rise to an action for damages against

the conspirators under Title 8, U. S. C. A., sections 43 and 47."

The court concluded, l. c. 1023:

> "In the light of the authorities above set forth, we are of the opinion that the allegations of the complaint stated a cause of action over which the district court had jurisdiction.
>
> The judgment of the district court dismissing the case is, accordingly, reversed, and the cause is remanded to the district court for trial."

In *Screws* v. *United States,* 325 U. S. 91, this Court said, l. c. 110:

> "It is said that we should abandon the holding of the Classic Case. It is suggested that the present problem was not clearly in focus in that case and that its holding was ill-advised. A reading of the opinion makes plain that the question was squarely involved and squarely met. It followed the rule announced in *Ex parte Virginia,* 100 US 339, 346, 25 L ed 676, 679, that a state judge who in violation of state law discriminated against negroes in the selection of juries violated the Act of March 1, 1875, 18 Stat. 335, 336 c 114."

If Rule 38, par. 5 (b), providing

> "Where a circuit court of appeals has rendered a decision in conflict with a decision of another circuit court of appeals on the same matter , * * * or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

means anything with reference to the issuance of a writ

of certiorari in any case, then this is the case to which said provision should be applied, under the foregoing authorities.

III.

Petitioner, as a citizen of Missouri in Kansas and Oklahoma, was denied the rights secured to her by Article IV, Section 2, Clause 1, of the United States Constitution; and, as a citizen of the United States, by the Civil Rights Act of April 9, 1866, particularly that part thereof embodied in Section 42, Title 8, U. S. C.; and therefore the complaint alleges a claim on which relief should be granted against respondents without reference to the XIVth Amendment.

The Civil Rights statute of April 9, 1866, embodied Section 42, Title 8, U. S. C. (R. S. U. S., Sec. 1978) which provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Oyama v. *California,* 332 U. S. 633-689, quoting the above statute in a footnote, states, l. c. 640:

> "By Federal statute, enacted before the Fourteenth Amendment, but vindicated by it, the states must accord to all citizens the right to take and hold real property."

Hurd v. *Hodge,* 334 U. S. 24, l. c. 30-31, 32, states:

> "Section 1978 of the Revised Statutes, derived from Section 1, of the Civil Rights Act of (April 9) 1866, provides:
>
> 'All citizens of the United States shall have the same right, in every State and Territory, as is

> enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.'
>
> All the petitioners in these cases, as found by the District Court, are *citizens of the United States.*"
>
> * * * * * *
>
> "Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-ninth Congress. Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land."

The Court held that in the District of Columbia the Civil Rights Acts gave the same protection to *citizens* of the United States as did the XIVth Amendment to citizens of the United States in any *state.* Of the action of the district court there, it said that it—as to the Act of April 9, 1866, l. c. 33:

> "'* * * denies rights intended by Congress to be protected by the Civil Rights Act and that, consequently, the action cannot stand."

Petitioner and her testator were citizens of the United States and of Missouri. Said Section 42 vested rights in citizens of the United States as citizens.

There are a few rights assured to citizens of the United States as citizens by the United States Constitution and laws, separate and distinct from the rights secured to

persons by the XIVth Amendment, which Congress had power to protect by Sections 41, 42, 43, 47, 48 and 49a, Title 8, U. S. C.—among which rights are those secured to petitioner as a citizen of Missouri while in Kansas and Oklahoma by Article IV, Section 2, Clause 1, of the Constitution.

This power antedates and does not depend upon the XIVth Amendment. And the question as to whether or not petitioner has a right to recover herein does not, therefore, involve the question of whether said Amendment only applies to state action. Such few Federal rights do not necessarily depend on said Amendment to the Constitution, but arise out of said statutes conferring capacity upon citizens of the United States to acquire, hold, own, enjoy and convey property. That citizens have been protected by such statutes has been incontrovertibly established by the decisions of this Court, largely in cases applying the criminal law parallels of said sections.

This Court, in *United States* v. *Waddell,* 112 U. S. 76, held that individual defendants who conspired to deprive a citizen of the United States of his property rights in his homestead, acquired and secured by Acts of Congress, alone, were liable for their wrongful acts. In said opinion the following appears, l. c. 77:

> "The first and second counts of the information undertakes to set out a conspiracy of the defendants, under section 5508, to deprive or hinder Burrell Lindsey, a citizen of the United States, of the right to establish his claim to certain lands of the United States under the Homestead Acts."

Section 5508 contained language similar to that in Section 47 (2) and (3), at l. c. 77-78.

Said decision of this Court recognizes the validity of an Act of Congress which subjected conspirators to lia-

bility for depriving a citizen of the United States of property and property rights secured to him by said Act of Congress alone, without reference to any constitutional provision—whether said conspirators were, or were not, exercising state power.

So that, applying the principle there applied, the complaint in this case alleges facts authorizing petitioner to recover under said Civil Rights Acts, whether respondents exercised state power or not.

United States v. *J. C. Williams et al.*, October term, No. 26, quotes the opinion of the Court of Appeals for the fifth circuit on its page 2 as follows:

> "It held that in the conspiracy provision of Section 19 'the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the clause of the Fourteenth Amendment.' 179 F. 2d 644, 648."

While the right in *United States* v. *Waddell*, 112 U. S. 76,

> "* * * did not pertain to United States citizenship"

as stated in the majority opinion in the Williams case (No. 26), yet the right of petitioner herein, under Section 42, Title 8, U. S. C., does depend upon her alleged (R. 2) and admitted United States citizenship.

That opinion states, p. 10:

> "In *United States* v. *Waddell*, 112 U. S. 76, interference with the right to establish a claim under the Homestead Acts brought the offender within Section 241. The right did not pertain to United States citizenship; but since it was 'wholly dependent upon the act of Congress,' obstructing its exercise came 'within the purview of the statute and of the con-

> stitutional power of Congress to make such statute.' 112 U. S. at 79, 80."

Manifestly Congress has at least as much power to protect the property rights of a citizen of the United States by Sec. 42, U. S. C., as it had to protect the homestead of a person who is not a citizen. *Hurd* v. *Hodge*, 334 U. S. 24, points out that, l. c. 31:

> "All the petitioners in these cases * * * are citizens of the United States,"

thus showing that Section 42, enacted for the protection of citizens of the United States only, was the basis of the decision.

A fortiori, the dissenting opinions of the four Justices who dissent in said Williams case sustain petitioner's claim stated in the complaint.

These circumstances establish petitioner's right to recover against all persons who participated in the conspiracy and in the overt acts which deprived her of the rights secured by said Civil Rights Acts, whether some of them could be held to be or not be persons exercising state power under the decision in *Hurd* v. *Hodge*, *supra*, and *Williams* v. *United States*, No. 26, October Term, 1950.

The allegation in the complaint (R. 2-3) as to this case arising under the Civil Rights Act of 1866 (now Sections 41 and 42, Title 8, U. S. C.) brings this case strictly within the decision in *Hurd* v. *Hodge*, 334 U. S. 24-36, and establishes direct conflict between the decision of the Court of Appeals (C. A. 8) and *Hurd* v. *Hodge*, necessitating the issuance of the writ.

Shelley v. *Kraemer*, 334 U. S. 1, at l. c. 11, states:

> "Thus, Section 1978 of the Revised Statutes, 8 U. S. C. A., Sec. 42, 2 F. C. A., Title 8, Section 42,

> derived from Section 1 of the Civil Rights Act of 1866, which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides * * *"

also then quoting Section 42, Title 8, as above.

Under the foregoing authorities, respondents are liable as individuals without reference to whether some of them were, or were not, exercising state power.

IV.

Petitioner is entitled to certiorari under Rule 38, paragraph 5, of this Court, because the decision of the Court of Appeals is in conflict with the decisions of three Courts of Appeals of other circuits on the same matter.

The Court of Appeals' decision conflicts with the decisions of three (3) Courts of Appeals of other circuits on the same matter, in holding that no cause of action was alleged, contrary to said decisions.

Respondents and others (Pro. 4) were parties to a conspiracy to which Missouri and Kansas state officials were also parties.

The complaint alleges (R. 3, Pro. 4):

> "Those conspirators who were not officials of said states materially and physically participated in said conspiracy, and in all the overt acts of said state officials done pursuant to said conspiracy, and have joined in and adopted the said conspiracy as their own."

In *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 F. 2d 240, at l. c. 249-250 (C. C. A. 3) it is said:

> "But if, as the plaintiffs assert, this defendant 'materially and physically participated in' all the alleged unlawful acts of September 15, 1941, it may

> have joined in, or as the plaintiffs put it, 'adopted' the conspiracy as its own."

The conspirators who were the repositories of state power were a Missouri "special" probate judge, a Kansas state district judge, and Commerce Trust Company as an executor and administrator.

In *Valle* v. *Stengel*, 176 F. 2d 697 (C. A. 3), it was held that the fact that a law enforcement officer of the state acted in defiance of its law, l. c. 702:

> "• • • will not serve as a defense and, since the complaint alleges in effect that he aided and abetted the corporate defendant and the managing defendants, his actions may be attributed to them and treated as their own."

In *McShane* v. *Maldovan*, 172 F. 2d 1016, at l. c. 1019 (C. A. 6), it was said:

> "The issue before us is whether a conspiracy entered into between state officers and others acting under color of state law to deprive a person of constitutional rights secured under the Fourteenth Amendment, and resulting in deprivation of such rights, gives rise to an action for damages against the conspirators under Title 8, U. S. C. A., Sections 43 and 47."

Discussing and following *Picking* v. *Pennsylvania R. Co.*, at l. c. 1022, it is said:

> "The court concluded that the plaintiff had stated a cause of action under the statute in alleging that the state officials had conspired with another to deprive the appellant of her rights under the Fourteenth Amendment, under color of law."

At l. c. 1021 it said of *Picking* v. *Pennsylvania R. Co.:*

> "That case was decided squarely upon the provision of the statute that is before us in this case, 8 U. S. C. A., Sec. 43."

At l. c. 1023 it is said:

> "The allegations of the complaint in the instant case charged state officers and others with combining in a willful and malicious conspiracy to deprive appellant of the rights secured to her by the Fourteenth Amendment. * * * In the light of the authorities above set forth, we are of the opinion that the allegations of the complaint stated a cause of action over which the district court had jurisdiction."

V.

The acts of Commerce Trust Company injuring petitioner and testator were done by it under color of state law, to-wit: as an executor and administrator of the State of Missouri claiming power by virtue of an appointment under the statutes of the State of Missouri, and because of its own misappropriation, and permitting others to misappropriate, the property of testator and petitioner, which rendered it and its confederates liable under the provisions of Section 43, Title 8, U. S. C.

Throughout the ages, an administrator has always been regarded as the agent of the state. For such official enables the state, in the exercise of its sovereign power, to transfer the properties of persons who die to those persons to whom the state authorizes its transfer as pointed out in *Leakey Adm.* v. *Maupin,* 10 Mo. 368, at l. c. 370:

> "In ancient times when a man died intestate, the King, as *parens patriae,* took possession of his effects to be employed in defraying the expenses of his

> burial, paying his debts, and for the support of his wife and children or other kin. The execution of this trust was devolved on the clergy, and many abuses growing out of their conduct in relation to it, the Statute of Westminster II, 13th Ed. I, which was said to be in affirmance of the common law, enacted that the ordinary should pay the debts of the intestate as far as his goods extended, in the same manner the executors were bound in case the deceased had left a will. But the residuum after payment of debts remained in the hands of the ordinary to be applied to any purposes his conscience might approve. Great abuses arising under the exercise of this power, the Legislature again interposed, and by the statute of 31st Edw. III, required the ordinary to depute the next and most lawful friends of the intestate to administer his goods. This is the origin of administration in England."

In *Riley* v. *New York Trust Co.*, 315 U. S. 343, l. c. 354, this Court states:

> "It seems quite obvious that the administrator c. t. a. appears in Delaware as an *agency of State of New York,* and not as the alter ego of the beneficiaries of the Hungerford estate. * * *
>
> A state is interested primarily not in the payment of particular creditors, nor in the succession of heirs or beneficiaries, as such, but in the administration of the property of its citizens, wherever located, and that of strangers within its boundaries. In a society where inheritance is an important social concept, the managing of decedent's property is a *sovereign right* which may not be readily frustrated."

In *State ex rel.* v. *Bird,* 253 Mo. 559, l. c. 583-584, following *Maxey* v. *Bell,* 41 Ga. 183, the court recognizes the offices of administrators and guardians as public trusts.

In *State ex rel. Burnes Nat'l Bank* v. *Duncan*, 302 Mo. 130, it is said, l. c. 139:

> "It has always been held that the power to regulate the acquisition and transfer of property, descents and distributions, the devolution of estates, etc., is exclusively within the jurisdiction of the State. (*Overly* v. *Gordon*, 177 U. S. 214; *Pennoyer* v. *Neff*, 95 U. S. 714.) Trustees, executors and administrators are the instruments through which the State regulates and controls certain classes of property. This is recognized by the Federal courts in the cases just mentioned. It naturally follows that the State, by statute, has the right to say, and the state courts have the right finally to determine *what agencies may exercise such control without acting in contravention of the state law.*" (Italics ours.)

Section 11,801, R. S. Mo., 1919 (now Sec. 363.200, R. S., 1949) authorizes a trust company to become an executor or administrator:

> "* * * (3) * * * in the manner now provided by law for the appointment of individuals to any such office."

In *In re Petition of Mulford*, 217 Ill. 242, on the question of state agency and state sovereignty, the court said, l. c. 246, 247, 248, 249:

> "The State, acting in its sovereign capacity, by appropriate legislation regulates and controls the devolution of property after the death of an owner." (l. c. 246.)
>
> "The judicial procedure thus established to regulate and control the devolution of property by will is the exercise of governmental power and duty by the State, and executors acting by force of such procedure exercise functions that are official in character. The

position is denominated an 'office' in sections 31 and 36 of the Administration act." (l. c. 247.)

"An executor receives formal letters testamentary, which constitute his commission as an officer. Before such letters may issue he must take the oath of office prescribed by the statute and must execute a bond to the People of the State of Illinois conditional for the faithful performance of the duties of his office. * * *" (l. c. 247.)

"An executor is a public officer. (Wharton on Conflict of Laws, sec. 552; Woerner on Law of Administration, sec. 172.)" (l. c. 248.)

"The 'privileges and immunities' which are protected by the constitutional inhibition concern the personal and private rights of the citizen, such as his right to acquire and possess property, to pursue ordinary callings and secure happiness and safety, etc., * * *" (l. c. 248.)

"The power to control property of a deceased person to the end that it shall be applied to the payment of the just debts of the decedent, for the protection of those who were peculiarly dependent upon him and who may otherwise become burdens on the public, and the remainder be transmitted to the persons or to the purposes the testator desired it to go or be applied to, rests in the state in its sovereign capacity. In exercising this governmental function the State has the clear right to call to its aid and to invest with official power only such persons as are residents within its territorial limits. No nonresident enjoys the 'privilege or immunity' to participate, as an officer, in the administration of the affairs of the State, nor has he any right of 'liberty or property' in the fees or emoluments of any such office or public position." (l. c. 248-249.)

Commerce Trust Company was fully cognizant that *In re Mulford* correctly states the law as it is in Missouri, as shown by the decision of the Supreme Court of Missouri in *Commerce Trust Co.* v. *Ellis*, 258 Mo. 702, wherein that court agreed with the contention of Commerce Trust Company that *In re Mulford* correctly states the law as it is in Missouri, l. c. 706-707:

> "Waiving the suggestion of respondent that the act in question is unconstitutional * * *, and presuming, as is our duty in the first instance, it to be a valid act * * *, as is also urged by appellant (*Emmons* v. *Gordon*, 140 Mo., l. c. 500; *In re Mulford*, 217 Ill. 242); * * *"

Part Second of Woerner on the American Law of Administration, 3rd Ed., page 671, begins:

> "OF THE INDUCTION TO THE OFFICE OF EXECUTOR AND ADMINISTRATOR."

In paragraph 10 on page 10 of said work it is said:

> "They are in the full sense officers of the law, and of courts organized and having jurisdiction for the especial purpose of aiding and controlling them."

Said text, in a note, cites *Byers* v. *McAuley*, 149 U. S. 608, and proceeds:

> "But they are not state officers in the usual sense; *Stevens* v. *Larwill*, 110 Mo. App. 140, l. c. 157. An administrator is not an agent of his intestate but a public trustee of defined and limited powers; *Henry* v. *Henry*, 73 Neb. 746, 107 N. W. 789."

Missouri law is controlling. The futile citation of *Wilcox* v. *Horan*, 178 F. 2d 162, 165, shows there was no administrator involved and no Colorado law on the point as to a

guardian. Herein the Missouri law is the best evidence as to whether or not its executors and administrators are its agents.

Today, as in the days when the ordinary administered assets of an estate, Commerce Trust Company as a Missouri administrator, is liable individually as a trespasser and of its own wrong for interfering with and causing the loss of the assets of estates in other states, as did Commerce Trust Company with a vengeance in Kansas and Oklahoma.

In *Emmons* v. *Gordon,* 140 Mo. 490, l. c. 498, it is held that a Missouri administrator could not take possession of property of an estate in any other state "without becoming a trespasser."

Coke's comment on Chapter 19, Westminster II, is:

> "If the ordinary take goods of the intestate, being out of his diocese, he shall not be charged as ordinary by this act, because he taketh them of his own wrong, and not as ordinary, in which right he is to be charged by this act."
>
> Citing 12 R. 2 Administrat, 21.
> Lib. 5. fo. 29, the Princes Case
> 9 Eliz. Dier 255, 256. lib. fo.
> Sir Moyle Finches Case.

This Court and those of Missouri and Kansas have similarly ruled in:

Fenwick v. *Sears' Administrators,* 1 Cranch. 259.
Dixon's Executors v. *Ramsey's Executors,* 3 Cranch. 319, l. c. 323-324.
Vaughan v. *Northup,* 15 Pet. 1, l. c. 6.
Stacy v. *Thrasher,* 6 How. 44, l. c. 60.
Ingle v. *Jones,* 9 Wall. 486, l. c. 495.
Johnson v. *Powers,* 139 U. S. 156, l. c. 159, 162.

Brown v. *Fletcher's Estate,* 210 U. S. 82.
Ingersoll v. *Coram,* 211 U. S. 335, l. c. 361-362.
Bank v. *Dowdy,* 175 Mo. App. 478, l c. 482.
Richardson v. *Busch,* 198 Mo. 174, l. c. 183-184.
Bank of Seneca v. *Morrison,* 200 Mo. App. 170, l. c. 178.
National Bank of Topeka v. *Mitchell,* 154 Kan. 276, 118 Pac. (2d) 519.

Section 49a, Title 8, U. S. C., authorized the District Court to utilize the common law of Missouri in giving effect to the Civil Rights Acts. So that, that common law, as stated by Coke and above applied, in combination with the Civil Rights Acts, authorized petitioner to recover, since both Commerce Trust Company and the Missouri "special" probate judge, and the Kansas district judge, were parties to the conspiracy and participated in the unlawful overt acts of Commerce Trust Company.

Section 8026, R. S. Mo., 1939, providing for the appointment of, and exercise of, powers as executor, and in other fiduciary capacities of Missouri trust companies, in paragraphs 3, 7 and 11 refers to the OFFICE of executors and administrators as an "OFFICE."

In *In re Irwin's Estate,* 123 Mo. App. 508, in discussing a contract with reference to an appointment of an administrator, the court said, l. c. 512, 513:

> "This was trafficking in the OFFICE of the administrator, which was void as being against public policy. 'A promissory note, where the consideration is an agreement to procure a responsible party and have him appointed administrator of an estate, is void as against public policy.' (*Porter* v. *Jones,* 52 Mo. 399.) * * * 'Traffic in public OFFICE is against good morals and contrary to public policy.' (*Basket* v. *Moss,* 115 North Carolina 448.)

> While an administrator may, lawfully, for a valuable consideration agree with the heir to render services as such for a compensation other than that provided by law, he cannot make any such agreement for a consideration pertaining to his right to obtain or retain that OFFICE, for that would amount to trafficking for the position and contrary to public policy."

In *Brandenburger* v. *Puller,* 266 Mo. 534, at l. c. 540, the court said:

> "The case of *Porter* v. *Jones,* 52 Mo. 399, was determined upon grounds of public fraud, the trafficking in appointments of administrations, and the corrupt procuring of an appointment to an OFFICE of trust."

Sections 43 and 47, Title 8, U. S. C., and Section 20, Criminal Code, are shown, by the legislative history of both, to be *in pari materia.* In *Southland Gas Co.* v. *Bayley,* 319 U. S. 44, 47, the necessity for similarity of construction of statutes *in pari materia* is shown. In *Picking* v. *Pennsylvania R. Co.,* 151 F. (2d) 240, 248-249 (C. A. 3), the court held that the Civil Rights sections (civil and criminal) relating to acts under color of state law are *in pari materia,* and that the civil section must be given the construction theretofore given to the criminal sections in *Screws* v. *United States* by this Court.

In *Williams* v. *U. S.,* No. 365, October Term, 1950, affirming the Court of Appeals in 179 F. (2d) 656, the court held that a private detective, who was given a courtesy card by the city of Miami and who was neither in the employ of the city nor state but committed the acts described in the opinion in violation of Section 20 of the Federal Criminal Code, in the presence of one Ford, a

policeman, was found to have "a semblance of policeman's power from Florida" by reason of said acts.

It follows that, in addition to the state judges exercising state power, Commerce Trust Company was a state agent and was exercising state power.

Of the "Trinity of Rights" protected by the due process clause of the XIVth Amendment (*State* v. *Julow,* 129 Mo. 163), it has been ruled that if state officers charged with the duty of protecting life and liberty of others themselves destroy same, or permit others to do so, they are liable both civilly and criminally (*Screws* v. *United States,* 325 U. S. 91; *Catlett* v. *United States,* 132 F. 2d 902; *United States* v. *Trierweiler,* 52 F. Supp. 4).

In protecting life and liberty, the state is engaged in the exercise of its governmental or sovereign power. So that, its agents and officers are liable under the Civil Rights Acts, when acting under color of state law they are false to the trust reposed in them.

By the same token, when the state is engaged in the exercise of its governmental or sovereign power in transferring the properties of the dead to the living who are entitled thereto by virtue of the laws of the latter, and when the state selects instruments and agents to whom it gives custody of such property, then, if such agents are false to their trust, and false to their fiduciary obligations, as was Commerce Trust Company herein, then they are likewise liable under the Civil Rights Acts for either destroying the property thus confided to them, or permitting others to misappropriate it, and are liable therefor.

The decision of the Court of Appeals to the effect that Commerce Trust Company, as executor and administrator, is not amenable under the Civil Rights Acts is a decision which is contrary to the humane principle that no person shall unlawfully suffer a property loss without a remedy, which has always been recognized by this Court and by

the English common law. This is evidenced by the opinion of this Court in *Marbury* v. *Madison*, 1 Cranch. 137, wherein it says, l. c. 163:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. * * *
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for a violation of a vested legal right."

Even under the English law, the immunity which protected the chief of the state never protected the officers of the state whose duties were fixed by law, and who violated that law. Thereupon the opinion proceeds, l. c. 165:

> "After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, Vol. 3, p. 255, says, 'but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy: but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

The Court of Appeals and the District Court applied the rule of English law to the complaint in this case, that "personal injury from the King to a subject is presumed to be impossible," and based their erroneous decisions that the complaint failed to state a cause of action on that principle by placing judges in the same regal position as the Monarch of England, who could do no wrong, con-

trary to the opinion of Justice Sutherland, concurred in by the late Chief Justice Stone, in *United States* v. *Manton*, 107 F. 2d 834, and that in *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, and other like cases, which establish the truth that neither this, nor the other Federal courts, subscribe to such erroneous doctrine.

The maxim or principle that the king can do no wrong (Blackstone, Book 3, p. 255) has no place in American constitutional law, yet if a right was invaded by the king in England the law furnished the subject

> "* * * with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute; and as it presumes that to *know* of the injury and to *redress* it are inseparable in the royal breast, it then issues, as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved." (Blackstone, Com. Book 3, p. 256.)

In this country there is no king to order the judges to do justice to an aggrieved party, but there is a constitution which constitutes a perpetual mandate to the judges to do justice to the party aggrieved. As said in Note 1, Blackstone's Com. Book III, p. 256:

> "The state itself, which is the sovereign people in corporate organization, can no more wrong an individual with impunity than can a private person."

After pointing out that certain kinds of state officers were not liable, the Chief Justice proceeds, in *Marbury* v. *Madison, supra,* l. c. 166:

> "But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of

> those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."

Respondents and their confederates, in violation of the law thus recognized and declared by this Court, at their discretion "sported" away the vested rights of petitioner and testator, in violation of a principle of the common law which was in force long before the enactment of the Civil Rights Acts. And, since an executor or administrator is an officer of the law, it is subject to the application of that principle, and was long before the enactment of the Civil Rights Acts. Consequently, the Civil Rights Acts were adopted to supply a defect in the laws of the United States which did not exist in the English law.

And so, the Congress recognized that said defects should be supplied by enacting Section 49a, and, in the year 1948, had it renumbered 49a of Title 8, U. S. C., thus showing its intention that executors and administrators could not deprive beneficiaries of properties to which they were entitled, thus curing a defect in the law which was recognized by Chief Justice Mansfield in the Duchess of Kingston's case, 20 Howell's State Trials 412, when he gave an example of a void judgment:

> "Thus in the common case of executors, a creditor has a right to be paid out of the effects left by a dead person, who is debtor: the executor intending to cheat the creditor by an agreement with another person, who is no real creditor, prevails upon him to commence a suit, and suffers judgment to pass at the instance of such a friend; by which he is made the original creditor, and the executor, as representative, debtor to the person so suing by agreement. The real creditor cannot pursue any steps to undo the judgment: no, he says, by way of answer, that judgment is void against me; you two persons agreeing

and colluding together shall not turn the forms of law to my prejudice: * * *"

VI.

The language (Pro. 11), "But assuming that the state court proceedings were not within the jurisdiction of the courts which decided them * * * they were not void but, at most, erroneous" is a statement in direct conflict with the law as declared in the decisions of this Court, and all the other courts of appeals, and all the courts in the Anglo-Saxon world.

Said decision conflicts with the general law on the subject, well stated in *Manning* v. *Ketcham*, 58 F. 2d 945, where attention is given to the law as declared by this Court and the English courts on this question from the time of the case of the Marshalsea.

The decision of the Court of Appeals (Pro. 11) reflected in said language is in conflict with the decisions of this Court and all other courts holding that even in cases where a court has jurisdiction of the parties and the subject matter, yet if it is not within the power granted to it by the law of its organization, its decree is void. *Bigelow* v. *Forrest*, 9 Wall. 339; *Ex parte Lange*, 18 Wall. 163; *Windsor* v. *McVeigh*, 93 U. S. 274; *Gray* v. *Clement*, 286 Mo. 100, l. c. 109, S. C. 296 Mo. 497; *Charles* v. *White*, 214 Mo., l. c. 208; *Kansas City* v. *Mullins*, 209 S. W. 558; *O'Donoughue* v. *Boies*, 159 N. Y. 87, l. c. 98, 100; *National Bank of Topeka* v. *Mitchell*, 154 Kan. 276, 118 Pac. 2d 519; *Shelly* v. *Kramer*, 334 U. S. 1, 17.

The decision of the Supreme Court of Missouri in 345 Mo. 741-751 (R. 37-50, 692-701), is pleaded as *res judicata* settling the issues as to conflicting interests in this case in the second amended complaint in paragraph 45 (R. 25), which conflict rendered the judgments void.

VII.

The Court of Appeals erroneously affirmed the failure of the District Court to comply with the provisions of Rules 1 and 12 (b) (6) of the Rules of Civil Procedure, in that after said District Court had authorized the filing of matter and material outside the pleading for nearly two years—establishing petitioner's right to denial of respondents' motions for summary judgment—yet, without excluding same, the court dismissed the case on the theory that the complaint failed to state a cause of action.

Rule 12 (b) (6) was invoked by respondents who, with the consent of the district court, filed matter and material outside the pleading, which was not excluded by the district judge. The district court refused to pass upon respondents' motions for summary judgment (R. 78, 79-80, 81-82).

Said Rule 12 (b) (6) provides:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, * * *"

The district court also ignored Rule 1:

> "They shall be construed to secure the just, speedy, and inexpensive determination of every action"

in that, at the request of respondents (R. 78, 79-80, 81-82) the district court between April, 1948, and December 1, 1949 (83), permitted respondents to file matter and material incorporated in their 1,992 pages of supplemental printed record, and petitioner 787 pages of record and material in opposition, and then, after the truth of the

allegations of the complaint was established by said matter and material, the district court refused to rule on, and overrule, respondents motions for summary judgment.

The Court of Appeals for the second circuit in *Compania de Remorque y Salvamento* v. *Esperance, Inc.*, 187 F. 2d 114, l. c. 117, has ruled that said Rule 12 (b) (6) is mandatory and compels the district court and the Court of Appeals, in such case, to dispose thereof under the provisions of Rule 56.

See, also, *Butcher* v. *United Electric Coal Co.*, 174 F. 2d 1003 (C. A. 7). In short, a motion to dismiss is thereby converted into a motion for summary judgment. See Advisory Committee's Note to Rule 12 (b) as amended, *Kelly* v. *R. F. C.*, 172 F. 2d 865 (C. A. 1). The district court itself referred to this case as one pending on motion for summary judgment (R. 103).

In *Sibbach* v. *Wilson*, 312 U. S., l. c. 13, in construing one of said rules, this Court said:

> "In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute, * * *"

And the Court further said that if said rule

> "* * * is within the authority granted, the federal legislature sanctioned it as controlling all district courts."

Rule 1 provides:

> "They shall be construed to secure the just, speedy, and inexpensive determination of every action."

The district court, in not excluding the matter and material outside the pleading—at the request of respondents—and in requiring the petitioner to incur the expense of securing and preparing and filing the material contained in the 787 pages of the printed record to counteract the matter and material contained in 1,992 pages of respondents' supplemental printed record, and then refusing to decide the questions raised, would seem to be a direct disobedience of said rule, which has the force of a statute. In the Sibbach case this Court points out, l. c. 14:

> "• • • that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."

It is singular that in this case, when the truth contemplated by the rule was establisheed, the district court refused to give any effect thereto, and the Court of Appeals erroneously approved its erroneous decision—which decision so approving was in direct conflict with the above decisions of the Courts of Appeals for the First, Second and Seventh Circuits, and in direct conflict with the command of Rule 1 and Rule 12 (b) (3) of the Rules of Civil Procedure promulgated by this Court for the guidance of the district courts—and the decision of this Court in *Sibbach* v. *Wilson*, 312 U. S. 1.

Said rule had even more potency than a lawfully enacted rule of the Court, the effect of which was stated in *Rio Grande Irrig. & C. Co.* v. *Gildersleeve*, 174 U. S. 603, and *Weil* v. *Neary*, 279 U. S. 160. In the Rio Grande case this Court said, l. c. 609-610:

> "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon the

parties to an action, and cannot be dispensed with to suit the circumstances of any particular case."

In the Weil case Chief Justice Taft, speaking for the Court, said, l. c. 169-170:

> "It is clear that a rule of court thus authorized and made has the force of law. *Rio Grande Irrig. & Colonization Co.* v. *Gildersleeve,* 174 U. S. 603, 608, 43 L. Ed. 1103, 1105, 19 Sup. Ct. Rep. 761; *Thompson* v. *Hatch,* 3 Pick. 512; *District of Columbia* v. *Roth,* 18 App., D. C. 547, 550; *Murphy* v. *Gould,* 39 App., D. C. 363, 367; *Wilkinson* v. *Walker* (D. C.), 292 Fed. 402; *State ex rel. Whitaker* v. *Langford,* 158 Ind. 34, 62 N. E. 624; *Advance Veneer & Lumber Co.* v. *Hornaday,* 49 Ind. App. 83, 86 N. E. 784."

VIII.

The Kansas Statute of Wills, authorizing a bachelor to make his will and preventing revocation thereof by his marriage and death without children, rendered the judgments awarding his widow one-half of his estate in Kansas void.

Section 22-201, R. S. Kan. 1923 and 1935, made the common law of England, as to the above point, the law of Kansas (*Shorten* v. *Judd,* 60 Kan. 75; *Vanek* v. *Vanek,* 104 Kan. 624). That law, as stated by Lord Ellenborough, is:

> "Marriage, indeed, and the having of children, where both those circumstances have occurred, has been deemed a presumptive revocation, but it has not been shown that either of them singly is sufficient. I remember a case some years ago of a sailor who made his will in favor of a woman with whom he cohabited, and afterwards went to the West Indies and married a woman of considerable substance; and it was held, notwithstanding the hardship of the case, that the will swept away from the widow every

shilling of the property; for the birth of a child must necessarily concur in order to constitute an implied revocation."

(*Doe a of White* v. *Barford*, 4 M. & S. Rep. 10, l. c. 12.)

Respondents' claim that as to his Kansas property John Moffett died intestate as to one-half thereof, and claim that Mrs. Weede is entitled thereto by the law of intestate succession.

The trouble with that contention is that the Roman Law as to intestate succession is in force in Kansas, as shown by the decision in *Riemann* v. *Riemann*, 124 Kan. 539, l. c. 542:

"While the jurisprudence of this state is greatly obligated to the common law, on this particular subject of adoption as well as *on the law of intestate succession* our lawmakers deliberately crossed over to the side of the civil law—an historical fact which gives a keynote to the general trend of decisions of this court throughout its entire history."

In Sohm's Institutes, 2d Ed., p. 482, it is said:

"In the free marriage of Roman law the principle of separate property was strictly applied. The property of both husband and wife remained unaffected by the marriage not only during their joint lives, but also after the death of either of them. According to the civil law a free marriage did not give rise to any mutual rights of succession as between husband and wife as such."

In Burdick's Principles of Roman Law and Their Relation to Modern Law, at page 572 it is said:

> "The 118th Novel made no provision for the succession of a husband to his wife or of a wife to her husband. Only those persons who were related by blood were included in this law."

The Supreme Court of that state holds that in such a case as this there is no revocation, as the will is valid in its entirety (*Vanek* v. *Vanek*, 104 Kan. 624; *Schippel* v. *Jennerson*, 169 Kan. 151) by virtue of the Kansas Statute of Wills.

Since said statute was before the Kansas courts, they were without jurisdiction to proceed contrary to the unquestionable and unquestioned letter of its provisions. *United States* v. *Walker*, 109 U. S. 258; *Clevinger* v. *Figley*, 68 Kan. l. c. 707—both of which cases cited *Bigelow* v. *Forrest*, 9 Wall. 339, and *Windsor* v. *McVeigh*, 93 U. S. 274; *Gray* v. *Clement*, 286 Mo. 100, l. c. 109.

In the Clevinger case the court stated:

> "In pronouncing the sentence the court has the statute before it, and is bound by the unquestioned and unquestionable letter of its provisions. It has no investigation to make or independent conclusion to form, and any transgression of the language of the law is inoperative and void."

In *Gray* v. *Clement* the court stated:

> "*Where the Constitution or statute absolutely prohibits a court from doing a particular thing then the order or judgment of the court made in violation thereof is absolutely void for want of jurisdiction* and may be assailed in a collateral proceeding." (Italics the Court's.)

An affirmance on appeal of a void judgment does not make it valid (*Revere* v. *Revere*, 133 Kan. 300, l. c. 302-303).

IX.

Commerce Trust Company became executor and administrator of the Moffett estates in consideration of its act in preparing John Moffett's will—an act made a misdemeanor by the Missouri statutes. All proceedings by it in said offices are therefore void.

The opinion (Pro. 3) states that Commerce Trust Company wrote the will of John Moffett through Mr. Howard, "as trust officer and attorney" for it. The complaint supplements that statement by the statement that it (R. 7) was in consideration of being nominated as alternative executor. In so writing said will, Commerce Trust Company violated the statute of the State of Missouri enacted in the year 1915 (Laws 1915, p. 99), or about 6 years before it wrote the will. That statute made the act of a corporation writing a will an act that comes within the definition of practicing law, and made the commission of such act a misdemeanor. Consequently, all of its acts after such appointment, having had a criminal inception, were void for that reason alone, under the rule stated by this Court in *Oscanyan* v. *Winchester R. Arms Co.*, 103 U. S. 261.

The supreme court of Missouri in *State ex inf. Miller* v. *St. Louis Union Trust Co.*, 335 Mo. 845 at l. c. 860 discussed and reproduced said statutes, and declared that writing wills in consideration of being named as executor was practicing law in violation of the law, and that l. c. 872:

> "• • • respondent henceforth cease and desist from the aforesaid illegal practices and conduct its business according to law on penalty of the forfeiture of its corporate charter and franchise."

X.

Sections 87 and 88, R. S. Mo. 1939, enacted in 1845, were mere legislative decrees, void under the due process provisions of the Vth and XIVth Amendments. Said Vth was still functioning, as to Missouri legislation, by virtue of Article III of the treaty with France of April 4, 1803.

30

Sections 87 and 88 R. S. Mo. 1939, enacted in the year 1845 by the Missouri legislature, amount to a judicial decree depriving surviving partners of their own property without due process of law, in violation of the Vth Amendment made applicable by Article III of the Treaty with France of April 30, 1803 (R. 4-5), and also in violation of the XIVth Amendment adopted in 1868, in that the State of Missouri thereby enabled Commerce Trust Company to deprive the surviving partner, Thomas S. Moffett, of his property without due process of law and by a denial of the equal protection of the laws, in violation of Section 1 of the XIVth Amendment all contrary to the law, prohibiting administration on the estate of a living person.

That the Vth Amendment was made applicable by Article III of the Treaty with France results from the decisions of this Court. In *Balzac* v. *Porto Rico,* 258 U. S. 298, l. c. 309, it is said:

> "• • • a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union, as in the case of Louisiana and Alaska. This was one of the chief grounds upon which this court placed its conclusion that Alaska had been incorporated in the Union in *Rassmussen* v. *United States,* 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. Rep. 514."

Said article of the treaty is:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantagees and immunities of citizens of the United States, * * *"

It was made applicable to the Territory of Louisiana by its terms, and gave to the then and future inhabitants of said Territory the same rights as citizens of the United States and the protection of the United States Constitution.

And so, when said partnership administration statutes were enacted, they were still-born. And if anything could make them more so, it was the XIVth Amendment adopted 23 years thereafter.

So that said Sections 87 and 88 appear on their faces to be utterly void—and the order of the "special" probate judge appointing Commerce Trust Company to administer on the estate of Thomas S. Moffett—in so far as it consisted of his property in the assets of said partnership estates—was for that reason void, as stated in *Johnson* v. *Beazley*, 65 Mo. 250; *Scott* v. *McNeal*, 154 U. S. 34; *Griffith* v. *Frazier*, 8 Cranch. 9; *Rose* v. *Himely*, 4 Cranch. 421. Said authorities hold that administration on the estate of a living person is void.

Missouri itself, recognizing the invalidity of said partnership administration statutes, has repealed same (Session Laws Missouri 1949, p. 506). At l. c. 521, Section 44 reads:

> "All acts or parts of acts inconsistent with this act are hereby repealed."

Justice Catron, discussing said third article of the Treaty in the Dred Scott case, 19 How. 393-633, and its application to the contemplated future population, said:

> "And for this contemplated future population, the Treaty as expressly provided as it did for the inhabitants residing in the Province when the Treaty was made. * * * This cannot be denied to the original inhabitants and their descendants. And, if it be true that immigrants were equally protected, it must follow that they can also stand on the Treaty."

As recently as the year 1892 this Court in *Boyd* v. *Nebraska,* 143 U. S. 135, quoted and gave effect to Article III of the Treaty with France, citing Justice Catron's opinion in the Dred Scott case, holding that a person who, long after the execution of the Treaty became an inhabitant of the Louisiana Purchase, in which the State of Nebraska is included, was protected by said Article in his rights as a citizen of the United States. So that, it is apparent that those statesmen who made said Treaty contemplated and intended that, by force thereof alone, all future inhabitants of said Louisiana Purchase would be protected by said Article III of the Treaty.

George Gordon's Apostrophes to Napoleon include no mention of his foresight as to the future inhabitants of the Louisiana Purchase. But one apostrophe applied by him could well be applied to the evil genius of Commerce Trust Company.

That apostrophe is:

> "He who of old would rend the oak,
> Dreamed not of the rebound:
> Chained by the trunk he vainly broke—
> Alone—how looked he round?
> Thou, in the sternness of thy strength,
> An equal deed hast done at length,
> And darker fate hast found!"

XI.

Under the allegations of the complaint and the law applicable thereto, the exercise of the sound discretion embodied in Rule 38 of this Court necessitates the granting of the writ prayed for.

The exercise of the sound judicial discretion embodied in Rule 38 of this Court compels and necessitates the granting of the writ prayed. This for the reason that it is the indispensable duty of this Court to grant said writ in this case under the facts and authorities referred to in this petition. For paragraph 5 of Rule 38 is peculiarly applicable to the facts herein. Those facts measure up to the conditions of said paragraph.

In *Osborn* v. *Bank,* 9 Wheat. 738, Chief Justice Marshall well states the law as to Rule 38 at l. c. 866:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature, or, in other words, to the will of the law."

The law applicable to said facts under Rule 38 has been well stated in *State* v. *Wood,* 23 N. J. L. 560, 564:

> "If the court below were bound to grant the writ of certiorari in the present case; if the law required that it should be done, and there was error in law in not doing it, clearly there was no room for the exercise of discretion. The writ, then, was of right, not of grace."

The facts which its own Rule 38 governs, and which this Court must consider in determining whether or not to grant certiorari, appear in the record in this case. For it appears that the decision of the Court of Appeals is in conflict with many decisions of other Courts of Appeals on the same matter, and in conflict with the decisions of the Supreme Court of Missouri on questions of local law applicable herein. And with the decisions of the Supreme Court of Kansas likewise applicable. And with the decisions of this Court likewise applicable, and there is no extrinsic reason in existence justifying denial of the writ.

So that the law, as embodied in said Rule 38, requires that this Court grant the writ, and that it would be error in law not to do so. For, under these facts and the applicable law, clearly there is no room for the exercise of discretion.

And so herein the writ is a writ of right, and not of grace.

The provision of Rule 38, paragraph 5, that

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor"

is a contradictory provision: (1) because whenever the facts in any case presented to this Court authorize this Court in the exercise of sound judicial discretion to grant a writ of certiorari, then such is a case wherein the facts under the applicable law make the granting of such writ a matter of right, and not of grace. For, if sound judicial discretion requires this Court to grant the writ, it could not refuse it without violating the law of its creation. (2) The statement that "and will be granted only where

there are special and important reasons therefor" is wholly superfluous, for the reason that it must be granted whenever this Court, in the exercise of a sound judicial discretion, is compelled, by the law applicable to said facts, to issue the writ, then it must be granted if the Court is to do its indispensable duty. And it cannot refuse to perform same by its rule declaring that it is not a matter of right, and that it will be granted only where there are special and important reasons therefor, which reasons are not defined or embodied in the rule itself and are wholly speculative and unknown.

XII.

Since the jurisdiction of this Court is vested by the Constitution, and not by any Act of Congress, this Court is without jurisdiction to refuse the performance of its constitutional duty by the exercise of its own discretion.

Certiorari in this case is a writ of right.

The opinions of the seven judges in *United States* v. *Baldi,* 96 F. Supp. 100, declining to decide whether a refusal of this Court to grant certiorari imports a decision on any issue or not; that of Chief Judge Learned Hand in *Schechtman* v. *Foster* (C. A. 2), 172 F. (2d) 339, holding such denial conclusive, and those of this Court in *Darr* v. *Burford,* 339 U. S. 200, as to whether or not this Court, in denying a petition for certiorari, decides anything which it had jurisdiction to decide, has suggested the above compelling reason for granting the writ to petitioner.

That certiorari is a writ of right as to this case is sustained by the following provisions of the Constitution: The first sentence of Article III thereof that

> "The judicial power of the United States shall be vested in one Supreme Court, * * *"

and those inferior courts established by Congress.

Said first sentence and the first clause of Section 2 of Article III providing that

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties * * *"

and of the last sentence of paragraph 2 of said Section 2 of Article III providing

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make"

excludes discretionary power on the part of this Court to refuse to take jurisdiction of this case.

This Court in *Dorr* v. *United States,* 195 U. S. 138, as to the provisions of the Constitution in Article IV, Section 3, granting Congress power to make "regulations" for Territories, held, l. c. 146:

> "Regulations in this sense must mean laws, for, as well as states, territories must be governed by laws."

Therefore, no regulations of the appellate jurisdiction of this Court can be made by any authority other than the Congress. For the regulations which the Congress is thus authorized to make are included in its legislative power, of which, through Chief Justice Hughes in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, l. c. 421, this Court said:

> "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. 1, Sec. 1. And

the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. 1, Sec. 8, Par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."

In *Durousseau* v. *United States*, 6 Cranch. 307, l. c. 313-314, in discussing the last sentence of Clause 2 of Section 2 of Article III, Chief Justice Marshall said:

> "It is contended that the words of the Constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by Congress; and that if the court had been created without any express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever.
>
> The force of this argument is perceived and admitted. Had the judicial act created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the Constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court as ordained by the Constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the Constitution."

The first sentence of paragraph 5 of Rule 38 conflicts with the above quoted language of the Chief Justice and the provisions of Article III of the Constitution. Said sentence provides:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Congress was denied authority by the Constitution, with reference to this Court, to do otherwise than

> "To make all laws which shall be necessary and proper for *carrying into execution*"

the judicial powers vested in this Court by the Constitution.

As pointed out by Chief Justice Hughes in *Panama Refining Co.* v. *Ryan, supra:*

> "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."

And so Congress could not transfer to this Court any discretion to decline to exercise the jurisdiction vested in it by the Constitution.

In *Wayman* v. *Southard,* 10 Wheat. 1, Chief Justice Marshall said, l. c. 43-44:

> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going further for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act, and the 7th section of the additional act, empower the courts, respectively, to regulate their practice. It certainly will not be contended that this might not be done by Congress."

The power given by statute to this Court to regulate its practice is, of course, appropriate, for otherwise it could not very well function.

But Congress could not give it power, discretionary or otherwise, to divest itself of the appellate jurisdiction vested in it by the Constitution. Congress could not give it power to refuse to exercise jurisdiction of 85 per cent of the cases lawfully brought here for review, as provided by Section 2106, Title 28, U. S. C., or refuse to exercise the appellate jurisdiction vested in this Court by the express language of the Constitution commanding that

> "* * * the Supreme Court shall have appellate jurisdiction, * * * with such exceptions and under such regulations as the Congress shall make." (Article III, Section 2, Par. 2.)

Said language confines the power to enact laws making exceptions to Congress only, in accordance with the rule that the exception from a power marks its extent.

Since appellate jurisdiction has been conferred on this Court by the Constitution, from which Congress has not excepted this case, and since Congress has acted in obedience to the provision that

> "The Supreme Court shall have appellate jurisdiction * * * under such regulations as the Congress shall make"

by enacting Sections 1254, 2101 and 2106, Title 28, U. S. C., it necessarily follows that said command of the Constitution compels the granting of the writ.

Section 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such

> further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

If Sections 1254, 2101 and 2106, R. S. U. S., have the same meaning as Section 240 (a), adopted in 1925, then they constitute an unlawful delegation of legislative power by Congress to this Court, which could not be delegated by the use of the words "to require by certiorari," and upon the theory that certiorari was a discretionary writ and therefore gave this Court power to make its Rule 38 providing that the question as to whether or not this Court would exercise its jurisdiction to review this case. For said language

> "to require by certiorari * * * that the case be certified to the Supreme Court for determination."

is equivalent to a law purporting to authorize this Court to be governed in all its acts by its own discretion whenever its appellate jurisdiction is involved.

Neither Constitution nor Act of Congress has authorized this Court to refuse jurisdiction of this case, either by, with, or without, the exercise of "sound judicial discretion." But, on the contrary, both the Constitution and Act of Congress placed this case within the appellate jurisdiction of this Court. Congress could not enact any law authorizing this Court to exercise its discretion to refuse to exercise its jurisdiction, or to refuse to perform its indispensable duty.

Justice Story calls attention to the imperative, impersonal, all-embracing language of the constitutional provisions vesting the judicial power of the United States, and emphasizes the exception referred to in the Constitution which Congress could make to the exercise of the appellate jurisdiction of this Court in *Martin* v. *Hunter's Lessee*, 1 Wheat., at l. c. 332-333, where he said:

"The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception if the preceding words were not used in that sense? Without such exception, Congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words 'may have' appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interest might, from time to time, require.

Other clauses in the Constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found that whenever a particular object is to be effected, the language of the Constitution is always imperative, and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised.

It being, then, established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial power shall extend to all the cases enumerated in the Constitution."

Sections 1254 and 2106, Title 28, U. S. C., show that the Congress intended and contemplated that the judicial power shall extend to all the cases enumerated in the Constitution which have been decided by courts of appeals.

Since the Constitution and laws enacted by Congress pursuant thereto shall be the supreme law of the land, there is no room for the exercise by this Court of its

discretion to deprive itself of that jurisdiction which is vested in it by said supreme law (Article VI, par. 2).

There are expressions in opinions of this Court to the effect that there is no constitutional obligation resting on this Court to exercise the appellate jurisdiction thus vested in it by the Constitution, but that the question is wholly a matter of the Court's discretion. (See *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, l. c. 918; *Darr* v. *Burford,* 339 U. S. 200-238, l. c. 223, 227-228.)

In *Darr* v. *Burford,* 339 U. S., l. c. 227-228, it is said:

> "To attach significance to a denial of a certiorari petition regarding the merits of the issues raised by the petition would be to transform a mechanism for keeping cases out of this Court into a means of bringing them in. It would contradict all that led to the adoption of certiorari jurisdiction and would reject the whole course of the Court's treatment of such petitions, both in practice and profession. For if denial does import an expression of opinion upon the merits of the case, then we must deal with the merits of the case."

Judge Learned Hand, with the concurrencee of his entire court, in *Schechtman* v. *Foster* (C. A. 2), 172 F. 2d 339, is recognized by Note 1 at page 228 of *Darr* v. *Burford, supra,* as having given to "* * * such denial conclusive effect on the merits." So has the report of the opinion in *Darr* v. *Burford, supra.* But it seems that it has often been held that the denial adjudges nothing. In *Carter* v. *St. A. B. R. Co.,* 338 U. S. 430, l. c. 438, it is said:

> "Where a case involves no general principle requiring pronouncement but merely its own unique circumstances, such alleviation is inconsistent with the criteria, set forth in Rule 38, governing this Court's discretion in granting a writ of certiorari."

Thus asserting that the nonexisting discretion as to whether or not it will exercise the appellate jurisdiction of this Court is governed by Rule 38 instead of by the Constitution and an Act of Congress.

Its Rule 38 amounts to legislation by this Court with reference to a subject matter concerning which only the Congress has power to legislate. For no court of the United States has any power to intrude upon the domain of Congress, and to, in effect, enact legislation, the duty of enacting which is confined by the Constitution to Congress alone.

The Constitution imposes upon this Court the duty to exercise the jurisdiction vested in it by the Constitution, whether original or appellate. And when that judicial power, under the constitutional command, extends to any case, then it is the duty of this Court to exercise its judicial power under the law well stated in *Cohens* v. *Virginia*, 6 Wheat. 265, l. c. 404, by the Chief Justice:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United

States. We find no exception to this grant, and we cannot insert one."

The idea that a fundamental law provides absolutely for the performance of a duty by any government officer or officers, or any department of the government, and that such officer or officers, or such department of the government, could exercise discretion as to whether or not it should perform its constitutional duties, is preposterous. For, if it can exercise its discretion as to whether or not it will do its duty, then it has no duty to perform, and the constitutional provision might as well be stricken from the Constitution. This Court has never consciously approved unconstitutional practices.

As instance the opinion of Chief Justice White in *Ex parte United States,* 242 U. S. 27-53, wherein it appeared that a practice in conflict with the provisions of the Constitution had been followed by the judges of United States courts, including some justices of this Court when sitting in lower courts, l. c. 51-52:

> "Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things, amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. • • • But we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the last, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future."

Another is *Swift* v. *Tyson,* 16 Pet. 1, decided in the year

1842, overruled in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64-92, where Justice Brandeis said, l. c. 79:

> "Thus the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' "

And so, the practice of substituting the discretion of this Court for the provisions of the Constitution and the Acts of Congress made pursuant thereto by declining to exercise the jurisdiction vested in this Court whenever it pleases is an unconstitutional assumption of power by this Court, necessitating its treatment as one.

> "• • • which no lapse of time or respectable array of opinion should make us hesitate to correct."

The power of a court to make law and justice of a brand to suit its ideas would not be above the just claim of a final judicature if it were not a condition precedent to the exercise of such power and the rendition of such justice that the leading principle on which it must be based would be its own discretion.

Attention is respectfully called to the history of the world and to the lessons which, in this respect, must be deduced therefrom to the effect that whenever the life, liberty or property of any human being was dependent for its preservation on the discretion of any man or tribunal, the direct consequence was that the first franchise and first right of that human being and, incidentally, all those which thereon vitally depend, is to be vitiated for some cause of which no man knows, and is to be proved by no known rule whatsoever of legal evidence.

This is so anomalous, not alone to our whole Constitu-

tion, but to the civilization which has been evolved by the English-speaking race, that it is apparent that the most trivial right which the citizen claims never was or can be vitiated in such manner.

That a court could properly decide by such rule could be supported only by the following method of reasoning: A court of last resort does not make laws. No, such power is not contended for; it only declares law and, as it is a tribunal both competent and supreme, what it declares to be law becomes law, though it was never law before.

Then the circumstance that there is no appeal from its decision is made to imply that it is unnecessary to follow any rule or constitutional mandate in its exercise.

The judgment does not derive its validity from conformity to the law, but preposterously, the law is made to attend on the judgment, and the rule of the judgment is no other than the arbitrary and occasional will of the individuals constituting the court. An arbitrary discretion leads, legality follows, which is just the very nature of a legislative and, hence, an illegal act.

The idea dominating the character of discretion herein referred to is that which in remote and barbarous ages resulted in the denial of human rights and the annihilation of human freedom. It is the species anathematized in the quaint and pointed phrase of Coke when he denounced the determination of legal questions by "the crooked cord of the discretion of the judges," and not in accordance with the "golden 'metawand' of the law" further illustrated by his statement in Part Two Coke's Institutes, page 56:

> "*recta linea est index sui, et obliqui,* hereby the crooked cord of that, which is called discretion, appeareth to be unlawful, unless you take it, as it ought to be, *discretio est discernere per legem, quid sit justum.*"

Both Coke and Camden condemned the exercise of that discretion referred to by Camden in the Court of Common Pleas in the trial of Hindson and Kersey when he said:

> "The discretion of a judge is the law of tyrants. It is always unknown. It is casual and depends upon constitution, temper and passion. In the best it is oftentimes caprice. In the worst it is every vice, folly and passion to which human nature is liable."

In *Cohens* v. *Virginia*, 6 Wheat. 264, in connection with contentions made as to its appellate jurisdiction created by the Constitution, this Court said, l. c. 377:

> "If such be the Constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department."

It is therefore respectfully submitted that the Court grant petitioner's petition for certiorari, reversing the judgment of the Court of Appeals and, under the authority conferred on it by Section 2106, Title 28, U. S. C., end this ancient and devastating litigation by itself directing the District Court to overrule respondents' motions for summary judgment, and to render a judgment finding that petitioner is entitled to recover from the respondents, and to empanel a jury to ascertain the amount of petitioner's damage.

MARTIN J. O'DONNELL,
Attorney for Petitioner.

FILED
JUL 3 1951
CHARLES ELMORE CROP

Supreme Court of the United States

No. 75.

LOUISE McGREW MOFFETT AS AN INDIVIDUAL AND EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED, PETITIONER,

VS.

COMMERCE TRUST COMPANY, A CORPORATION; HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP AND R. E. COPMAN, RESPONDENTS.

BRIEF OF RESPONDENTS, B. C. HOWARD AND WILLIAM H. KOPP, IN OPPOSITION TO PETITION FOR CERTIORARI.

B. C. HOWARD,
WILLIAM DENNIS BUSH,
Attorneys for Respondents, B. C. Howard and William H. Kopp.

INDEX

Statement 2

I. Missouri Probate Court Proceedings 2

II. Book Accounts 5

III. Kansas Litigation — District Court Harper County, Kansas No. 7374 6

IV. Harper County, Kansas No. 7374 9

V. Federal Court Litigation in Kansas 11

VI. Howard Fee Case 14

VII. Missouri Conspiracy and Damage Suit 15

VIII. Federal Conspiracy and Damage Suit 16

IX. Commerce Trust Company's Exhibit 8 17

Conclusion 18

Cases Cited

Clark vs. Moffett et al., (Revised in name of Grace Torrance Clark, Admx.) 136 Kan. 711 ..... 9, 10

Howard Fee Case, 345 Mo. 741 18

In re Moffett Brothers Partnership Estate, 345 Mo. 741, 137 S. W. 2d 507 14

Louise McGrew Moffett vs. R. O. Robbins, Adm'sr., District Court 14 Fed. Supp. 602, Court of Appeals 81 F. 2d 431 ..... 11, 12

Moffett vs. Commerce Trust Co., 354 Mo. 1098, 193 S. W. 2d 588 15

Moffett vs. Commerce Trust Co., District Court 87 Fed. Supp. 438, Court of Appeals 187 F. 2d 342 16

Moffett vs. Moffett, 131 Kan. 582 ..... 6, 8

Moffett vs. Robbins, 81 F. 2d l. c. 436 18

Statutes Cited

Section 80, Revised Statutes of Missouri, 1919 ——— 3
Section 85, Revised Statutes of Missouri, 1919 ——— 4
Section 90, Revised Statutes of Missouri, 1919 ——— 4
Section 91, Revised Statutes of Missouri, 1919 ——— 4
Section 202, Revised Statutes of Missouri, 1919 ——— 5

Supreme Court of the United States

No. 75.

LOUISE McGREW MOFFETT AS AN INDIVIDUAL AND EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED, PETITIONER,

VS.

COMMERCE TRUST COMPANY, A CORPORATION, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP AND R. E. COPMAN, RESPONDENTS.

BRIEF OF RESPONDENTS, B. C. HOWARD AND WILLIAM H. KOPP, IN OPPOSITION TO PETITION FOR CERTIORARI.

EXPLANATION.

Figures in parentheses: (_____), (W ____) and (C ____) refer respectively to pages of (1) Petitioner's Record, (2) Supplemental Record of respondents Helen Weede and Orlin A. Weede, and (3) Supplemental Record of Respondent Commerce Trust Company.

STATEMENT.

Petitioner in her petition filed herein refers to and makes her second amended complaint a part thereof, and alleges facts which are so arranged as to make them cloudy and uncertain and which makes it necessary for us to state them in an orderly way so the Court may have a better understanding of the issues involved in this certiorari proceedings.

I.

Missouri Probate Court Proceedings.

On February 21, 1921, John Moffett executed his last Will and Testament and therein named his brother, Thomas S. Moffett, Executor; and further provided (W-91) that in case of the death, inability or refusal of his brother to act, then and in that event, Commerce Trust Company, a corporation of Kansas City, Missouri, should become Executor.

On February 22, 1921, John Moffett married Helen Mustard (now Helen Weede) (R-7), and died on the 23rd day of August, 1927 (R-8).

On August 29, 1927, the Probate Court of Jackson County, Missouri, pursuant to the terms of the will, appointed Thomas S. Moffett Executor of the Estate of John Moffett, deceased (R-8), without bond. Following which, Thomas S. Moffett assumed the administration of the Estate of John Moffett, deceased.

At the time of the death of John Moffett he was a member of a partnership known as Moffett Brothers, which consisted of John Moffett and Thomas S. Moffett; of Moffett Brothers and Andrews, which consisted of John Moffett, Thomas S. Moffett and L. B. Andrews; and of Moffett

Brothers Cattle, Land and Lumber Company, which consisted of John Moffett, Thomas S. Moffett, Joseph W. Moffett and Renwick J. Moffett. Thomas S. Moffett was also a member of the partnership known as Andrews, Lewis and Moffett. The other members of said partnership were L. B. Andrews and J. C. Lewis (R-7). The business transactions between the individual members of said partnerships and the partnerships themselves were recorded in books known as the journal and ledger of Moffett Brothers & Andrews (R-7).

Thomas S. Moffett, as surviving partner of Moffett Brothers and Moffett Brothers & Andrews, failed to exercise his right to administer upon the estate of said partnerships by giving bond and submitting himself to the jurisdiction of the Probate Court as provided by *Section 80,* Revised Statutes of Missouri, 1919, but assumed the administration of said partnerships under the common law.

On account of the failure of Thomas S. Moffett as Executor of the Estate of John Moffett to perform his duties as required by law and on account of conflict of interests between Thomas S. Moffett, individually, and the estate of John Moffett and the partnership estates in which John Moffett was interested, Helen Moffett (now Weede), the widow of John Moffett filed in the Probate Court of Jackson County, Missouri, application for the removal of Thomas S. Moffett as Executor of the Estate of John Moffett. On November 7, 1928, the Probate Court, acting through a special judge, sustained said application and entered an order revoking Letters Testamentary which had been issued to Thomas S. Moffett.

On November 28, 1928, the probate court, through a special judge, pursuant to the terms of the will of John Moffett, issued Letters Testamentary (*de bonis non*) to the

Commerce Trust Company on the estate of John Moffett, deceased; upon which date the Commerce Trust Company assumed the administration of said estate and since that date has been acting as executor thereof.

Under Section 85, Revised Statutes of Missouri, 1919, it is provided that in the case a surviving partner shall neglect or refuse to give bond as required within thirty days after the granting of Letters Testamentary on the estate of the deceased partner, the Executor or Administrator for the deceased partner shall give additional bond and administer upon the partnership assets.

Additional bond was filed by the Commerce Trust Company and was approved by the court; and Commerce Trust Company, as Executor of John Moffett, deceased, was ordered to take charge of the assets of the partnership estates of Moffett Brothers and Moffett Brothers and Andrews.

Under the provisions of Section 90, Revised Statutes of Missouri, 1919, it is provided that the surviving partner and creditors of a partnership, taken charge of by the executor or the administrator of the deceased partner, may appear in court and defend against the recovery of any claim presented against such partnership or against the effects of such partnership; and further provides for an appeal from any judgment of the Probate Court. Under the provisions of this section the surviving partner or creditor have a right to protect their interests against demands of any and all claimants to said partnership assets or any part thereof.

Under the provisions of Section 91, Revised Statutes of Missouri, 1919, the administration upon the partnership assets, whether by the surviving partner or executor of the deceased partner, shall in all respects conform to the ad-

ministration in ordinary cases, except where otherwise provided.

Under the provisions of *Section 202*, Revised Statutes of Missouri, 1919, relating to general administration, it is provided that any executor or administrator may establish a demand against his Testator or Intestate by proceeding against his co-executor or co-administrator in the manner prescribed for other persons, and further provides that if there be no co-executor or co-administrator, he shall file his claim and other papers and the court shall appoint some suitable person to appear and manage the defense. It will therefore be seen that the Missouri law provides that not only the surviving partner has a right to defend the partnership estate but the law also provides that the court shall appoint suitable persons to defend the estate against all such claims.

The above mentioned sections of the Missouri statutes appear in full in Item 2 of Respondent Commerce Trust Company's Appendix (pp. 5-9) where they are quoted as they appear in Revised Statutes of Missouri, 1939.

Under the law above referred to, the protection of a partnership estate is amply provided for, which would seem to indicate that the cases referred to on page 5 of the petition are not applicable and should not be taken into consideration in the administration of partnership estates.

II.

Book Accounts.

Petitioner, in her second amended complaint filed in the District Court (R-7), alleges that the books of said partnerships were kept in a common office in Kansas City, Missouri, where they (the interested parties) attempted to keep books concerning the business of said partnerships

and individuals. The books kept in the common office in Kansas City, Missouri, showed the amount due from Moffett Brothers to John Moffett; the amount due from Moffett Brothers and Andrews to John Moffett; the amount due from Moffett Brothers & Andrews to Moffett Brothers; and the amount due from Andrews, Lewis & Moffett to Moffett Brothers & Andrews; and the amount due from Moffett Brothers Cattle, Land & Lumber Company to Moffett Brothers; and the amount due from Thomas S. Moffett to Moffett Brothers; and the books of Moffett Brothers & Andrews Commission Company, which were also kept in said common office, showed that Thomas S. Moffett was indebted to said Company.

The suits referred to by Petitioner on Page 6 of her petition as "some 14 groundless actions," (R-9-14), were all based on the book records which were kept in the Moffett office and it was the duty of the administrator of the John Moffett Estate, as well as the administrator of the partnership estates, to collect the amounts due and, if necessary, to institute legal proceedings for the collection of same.

III.

Kansas Litigation.

District Court Harper County, Kansas No. 7374. Moffett v. Moffett, 131 Kan. 582.

On August 15, 1929 (R-18, Para. 34), Thomas S. Moffett, the predecessor-in-interest of Petitioner, filed in the District Court of Harper County, Kansas, a partition suit wherein he sought a partition of the Moffett Brothers assets in Kansas without an accounting or an adjustment of the rights and liabilities of all parties interested therein.

Before and after the filing of the suit in Harper County, Kansas, Respondent Howard, as attorney for the

Commerce Trust Company, earnestly endeavored to induce the parties interested to compromise and settle their differences and avoid unnecessary delay and expense which would be the result of litigation. As a result of his efforts negotiations were carried on to the extent that an oral accord was reached and an instrument of compromise and adjustment was prepared for signature but Thomas S. Moffett thereafter refused to execute same. After which, Respondent Howard told Mr. Watson (Mr. Moffett's attorney) and others interested that, unless the parties reached some agreement, it would be necessary for the Commerce Trust Company in its respective capacities to intervene in the Harper County District Court, where all the parties had entered their appearance, and ask that court to order an accounting so these differences could be judicially determined between the parties interested.

The facts above referred to are partially set forth in Exhibit 44, R-651, which shows only segregated parts of the testimony given by Respondent Howard in what is known as the Howard Fee Case. The full record of this testimony of Respondent Howard is shown in Commerce Trust Company's supplemental record, pages 806-858. The reading of the transcript of testimony above referred to (Especially C-819-20) will clarify many questions concerning which the record (R-651), offered by petitioner, is incomplete. These pages also show the full testimony of Respondent Howard concerning the Commerce Trust Company's Exhibit 8. We urge the court to read this testimony.

After the failure of Respondent Howard to secure a settlement he, on behalf of the Commerce Trust Company as Executor *de bonis non* of the Estate of John Moffett, deceased, and as administrator of Moffett Brothers Part-

nership Estate, asked permission to intervene in the Kansas partition suit for the purpose of securing an accounting before distribution of the partnership assets.

This application to intervene was opposed by Thomas S. Moffett and after the permission was granted an appeal was taken by him to the Supreme Court of Kansas, 131 Kan. 582.

In its opinion sustaining the lower court the Supreme Court of Kansas said, l. c. 588:

> "Appellant contends that the action is not brought in the proper forum for an accounting. But the plaintiff chose this forum and is in no position to complain on that ground. Appellant contends that a proper accounting, such as asked for by appellees, would require the consideration of property situated in other states—Missouri and Oklahoma. But it is a principle of law, applicable to courts of equity, that such a court, having assumed jurisdiction of the subject matter, will reach out and draw into its consideration and its determination the entire subject matter, and bring before it all the parties interested therein, in order that a complete and effectual final decree, adjusting the rights of all parties, may be entered and enforced (*Hazen* v. *Webb*, 65 Kan. 38, 68 Pac. 1096; *Appel* v. *Smith*, 105 Kan. 732, 185 Pac. 903; the same case on rehearing, 106 Kan. 717, 190 Pac. 8).
>
> It is unnecessary to say much about the applications to intervene. It is clear from the allegations in these applications and from the answer of Helen Moffett, which are taken as true for the purpose of this appeal, that it will be necessary, to a substantial extent, for the trial court to treat the real property of the partnership as personalty, and to whatever extent that is necessary to be done the intervener, in its respective capacities, is a proper party to the action. Appellant contends that the Commerce Trust Company is intervening in two capacities which are in conflict.

But we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties.

On the whole it seems quite clear that there should be such an accounting as is prayed for by the defendant and intervener in order to determine the respective interests of the parties in the land sought to be partitioned."

On July 24, 1930, the Commerce Trust Company, on behalf of the John Moffett Estate and the Moffett Brothers Partnership Estate, filed intervening petitions in the district court and prayed for an accounting.

On June 15, 1931 (R-19, Para. 35), the ancillary administrator of the John Moffett Estate in Kansas (R. O. Robbins) also intervened in said partition suit and prayed for an accounting.

IV.

Harper County, Kansas No. 7374.

Revised in name of Grace Torrance Clark, Admx. Clark v. Moffett et al., 136 Kan. 711.

On December 22, 1930, (R-20) Thomas S. Moffett died and on February 14, 1931, the cause was revived in the name of Grace Torrance Clark, Administratrix with the will annexed, of the Estate of Thomas S. Moffett, deceased, and Louise McGrew Moffett, sole beneficiary of Thomas S. Moffett, deceased.

On January 13, 1932, the district court of Harper County, Kansas, the forum which Thomas S. Moffett chose during his lifetime, rendered judgment in the partition-accounting suit No. 7374 in favor of R. O. Robbins, ancillary administrator of the Estate of John Moffett, against the Moffett Brothers partnership in the sum of $143,829.96

(R-20); also a judgment in favor of Commerce Trust Co., Executor *de bonis non* of the Estate of John Moffett, against Thomas S. Moffett Estate in the sum of $27,399.25 (R-127), as well as judgment in favor of the Commerce Trust Company as administrator of Moffett Brothers against the Moffett Brothers Cattle, Land and Lumber Co., in the sum of $101,228.06 (R-21).

Grace Torrance Clark as ancillary administratrix and Louise McGrew Moffett the sole beneficiary of T. S. Moffett appealed from the above mentioned judgment and decree to the Supreme Court of Kansas (R-21, Para. 39).

The Supreme Court in its opinion sustained the district court in its findings and judgments, 136 Kan. 711, and said, l. c. 714,

> "This controversy, so comparatively simple in its broader aspects, as above outlined, has been complicated by the manner in which the litigation has been conducted by injecting into it a number of questions relating to practice or procedure and technical questions, many of which have little or no substantial merit, with the result that the parties have presented to this court for its analysis and its consideration 1740 pages of printed abstracts and briefs. Notwithstanding the extraordinary and wholly unnecessary bulk of the matter presented, we have endeavored to go through it carefully and painstakingly and have done so as fully as our time would permit, and will treat and dispose of all the questions presented that have any semblance of merit. * * *
>
> * * * * * * *
>
> l. c. 723, Finally it is contended plaintiffs did not have a fair trial, and that this is indicated by rulings and remarks of the court as the trial progressed. We have carefully examined the record and all counsel have said on this point and find the contention to be devoid of merit * * *. l. c. 724, The third item is the

one around which the battle of the trial raged. Much feeling was displayed. What caused this, or who is to blame for it, we shall not pause to consider, if, indeed, the record discloses. Perhaps because of it many contentions were made which were not well founded. Some tactics were indulged in, the obvious purposes of which were to impede rather than to aid the orderly administration of justice. With this attitude prevalent it is fortunate that the trial was before an able and experienced trial judge who could winnow the wheat from the chaff. While doing so the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, and, as we view it, in its main features, at least is the only one which properly could have been reached from the evidence."

The plaintiffs in the above case then filed, in the Supreme Court of the United States, a petition for certiorari, which petition was denied (290 U. S. 642).

V.

Federal Court Litigation in Kansas.

Louise McGrew Moffett v. R. O. Robbins, Adm'sr.
District Court 14 Fed. Supp. 602,
Court of Appeals 81 F. 2d 431.

A suit was instituted in the United States District Court for Kansas by Louise McGrew Moffett, executrix of the estate of Thomas S. Moffett, deceased, against R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased, to enjoin the enforcement of the judgment rendered in the above entitled accounting-partition suit in the district court of Harper County, Kansas, No. 7374. This suit was dismissed by Judge Hopkins on September 4, 1935, 14 Fed. Supp. 602. In dismissing this case Judge Hopkins said, l. c. 604,

"Decisions of state courts of competent jurisdiction are binding and conclusive on all other courts of concurrent power and are not reviewable by federal district courts of concurrent and equal competent jurisdiction. The federal district courts have no appellate jurisdiction over the decisions of state courts. Such decisions of state courts ordinarily cannot be collaterally attacked, except for fraud. Fraud which entitles a party to impeach the judgment of another court of competent jurisdiction, where jurisdiction has been acquired over the parties, as in the suit complained of, must be extrinsic to the matter tried in the other suit and not there in issue. *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. And fraud cannot be alleged by general allegations but the facts must be stated. See Simpkins Federal Practice (Rev. Ed., 1934), par. 533, p. 507. The rule is well established that when a party has a defense which he could have interposed and was not prevented from doing so by accident, fraud, or mistake, he cannot reserve that defense to some other time or forum and thus develop a multiplicity of suits and prolong litigation. *Luikart* v. *Farmers' Lumber Co.*, 38 F. 2d 588 (C. C. A. 10); *Smith* v. *Apple*, 6 F. 2d 559 (C. C. A. 8); *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 43 S. Ct. 458, 67 L. Ed. 719.

An allegation in a bill that a judgment is not supported by evidence is a mere conclusion. That a judgment is based upon evidence supporting it must be conclusively presumed in suit to enjoin enforcement thereof." *Harrington* v. *Denny et al.*, (D. C.) 3 F. Supp. 584.

Petitioners appealed from the judgment of the United States District Court to the United States Court of Appeals, 10th Circuit, which court sustained the action of the district court in dismissing the petition, 81 F. 2d 431. In sustaining the lower court Judge Bratton said, l. c. 437 (C-46):

"[13] The judgment is assailed on the further ground that there was no adversary trial. Louise McGrew Moffett, as sole beneficiary of the estate of Thomas S. Moffett, Grace Torrance Clark, as administratrix with the will annexed of that estate and administering the estate of Moffett Bros. in Kansas, and all others having any interest in the estate of the partnership, were parties to the action. The purpose of the proceeding was an accounting and partition; the issues were formed and the crux of the litigation concerned itself very largely with the asserted claim that the partnership was indebted to the estate of John Moffett, Louise McGrew Moffett and Grace Torrance Clark together waged vigorous but unsuccessful opposition to that claim. Counsel who represented them were paid $3,900 from the partnership funds as compensation for their service. Grace Torrance Clark made such payment. The trial consumed several days; all questions were seemingly considered thoroughly; extended findings of facts and conclusions of law were made dealing with every feature of the complicated situation; and an exhaustive judgment was entered. In these circumstances, the mere allegation that there was no adversary trial is a conclusion which the record affirmatively disproves.

[14] The contention that the judgment was not supported by evidence needs little discussion. Such a question can be determined only on appeal. It cannot be decided in an equitable action to enjoin enforcement of the judgment. *Harrington* v. *Denny*, (D. C.) 3 F. Supp. 584; *Harris* v. *Bigley*, 136 Iowa 307, 111 N. W. 432; *A. B. Smith Co.* v. *Bank of Holmes County*, (Miss.) 18 So. 847; *Nashville, C. & St. L. Ry. Co.* v. *Mattingly*, 101 Ky. 219, 40 S. W. 673; *Burke* v. *Wheat*, 22 Kan. 722; *Martin* v. *Pifer*, 96 Ind. 245.

Other questions are argued, but we think they are insubstantial. For the reasons indicated, the order of dismissal is affirmed."

Plaintiffs therein then filed a petition for certiorari in the Supreme Court of the United States which was denied, 298 U. S. 675.

VI.

Howard Fee Case.

In re Moffett Brothers Partnership Estate, 345 Mo. 741, 137 S. W. 2d 507.

Respondent Howard filed in the Probate Court of Jackson County, Missouri, an application for allowance of attorney's fees. The Probate Court allowed additional fees and approved a payment which had been previously made by the Commerce Trust Company as administrator of the Moffett Brothers partnership estate.

Petitioners appealed this allowance and approval to the Circuit Court which also made an increased additional allowance for attorney's fees and approved the payment which had been previously made.

From the judgment of the Circuit Court, petitioners appealed to the Supreme Court of Missouri, 345 Mo. 741, 137 S. W. 2d 507. The Supreme Court of Missouri disallowed the additional fees but approved the fees that had previously been paid, in doing so the Supreme Court of Missouri specifically stated, l. c. 508:

> "The record covers nearly 1,400 pages and the briefs cover nearly 700 pages, and many alleged grounds are urged by appellant to support the contention that the judgment should be reversed, but the conclusion we have reached makes it unnecessary to consider but one of these grounds, viz., that, under the facts, claimant is not entitled to any fee from the Moffett Brothers estate.
>
> It is contended by appellant that the trust company was not legally authorized to administer the Moffett Brothers estate, but, as stated, we shall consider only one question."

From this it will be seen that the Supreme Court of Missouri did not pass upon the validity of the judgment

of any court which had previously passed upon any questions involved in the administration of the Moffett affairs.

VII.

Missouri Conspiracy and Damage Suit.

Moffett v. Commerce Trust Co., 354 Mo. 1098, 193 S. W. 2d 588.

Following the decision of the Supreme Court of Missouri as above recited, petitioners brought suit in the Circuit Court of Jackson County, Missouri, for conspiracy and damages against the respondents in this cause. This case was dismissed by the Circuit Court of Jackson County, Missouri, on motion of defendants. After which, petitioners took an appeal to the Supreme Court of Missouri which sustained the action of the trial court in its dismissal of the conspiracy suit, 354 Mo. 1098, 193 S. W. 2d 588. At page 592 (S. W.) the court said,

> "*In re Moffett Bros. Partnership Estate,* 345 Mo. 741, 137 S. W. 2d 507, grew out of an attorney fee allowed B. C. Howard for representing Commerce Trust Company as administrator of the partnership estate. Mrs. Moffett, individually and as executor of her husband's estate, resisted the allowance in the probate, circuit and supreme courts. No point was presented or decided as to Mrs. Moffett's right to appear in both capacities. The only point decided was that Howard was not entitled to an additional fee. 345 Mo. l. c. 745, 137 S. W. 2d l. c. 508. * * *
>
> Appellants make many other assignments of error; assailing the constitutionality of Missouri statutes relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this country and France in 1803 and the 'due process' and other provisions of the State and Federal Constitutions. Most if not all these questions have been decided adversely to appel-

lants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. *Moffett* v. *Moffett*, 131 Kan. 582, 292 Pac. 947, 77 A. L. R. 294; *Clark* v. *Andrews*, 136 Kan. 23, 12 Pac. 2d 294; *Clark* v. *Moffett*, 136 Kan. 711, 18 Pac. 2d 555; *Id.*, 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; *Moffett* v. *Robbins*, D. C., 14 F. Supp. 602; *Moffett* v. *Robbins*, (10 Cir.) 81 F. 2d 431; *Id.*, 298 U. S. 675, 56 S. Ct. 940, 80 L. Ed. 1397. Appellants have not been denied due process. They have not only had their day in court, but their months and years."

Petitioners appealed to this court and this court dismissed the appeal because there were no Federal questions involved (329 U. S. 669).

VIII.

Federal Conspiracy and Damage Suit.

Moffett v. Commerce Trust Co.,
District Court 87 Fed. Supp. 438,
Court of Appeals 187 F. 2d 342.

Following the dismissal by this court, of the appeal in the above entitled cause petitioners filed their conspiracy and damage suit in the United States District Court for the Western District of Missouri, making practically the same allegations therein, as that made in the Missouri Court and the United States District Court dismissed this case, 87 Fed. Supp. 438.

From the order dismissing the suit, petitioners appealed to the United States Court of Appeals, 8th Circuit, which affirmed the judgment of the district court, 187 F. 2d 342.

Petitioner is now seeking a review of this case by petition for a writ of certiorari.

IX.

Commerce Trust Company's Exhibit 8.

Respondent Kopp is at a loss to understand the nature of the charges against him. Petitioner seeks to hold him in this case under a general allegation of conspiracy. So far as this record discloses, as is the fact, respondent Kopp has had no connection with any of this litigation since the trial of the Harper County suits in which he appeared in 1931 as a witness except the great burden of defending against numerous suits beginning after the middle of 1941. He has had his days, months and years in court defending against the unfounded charges of petitioner. The original petition did not name him as a party defendant (C-620-630). Respondent Kopp has examined the affidavits filed in this cause consisting of segregated excerpts widely separated, which do not reflect his real testimony in the Harper County proceedings. Respondent Kopp and his associate were employed by John Moffett and Thomas S. Moffett in their lifetime (W-97-98). Petitioner makes vicious assaults against Commerce Trust Company's Exhibit 8, prepared by this respondent and his associate. Petitioner in many places erroneously refers to Commerce Trust Company's Exhibit 8, as "being false," "worthless" and by the use of other like epithets. This respondent respectfully requests the Court to examine said Exhibit 8 in its entirety including the documents attached thereto as exhibits, the recitals of which have been garbled in some of the affidavits filed in this cause. As regards the testimony of this respondent, petitioner has apparently pursued the practice of quoting only excerpts from cross examination and entirely omitting testimony given in chief and on re-direct examination. Helen Weede's Exhibits 17 and 18 set forth (W-501-620) a considerable portion of this respondent's testimony given at the time petitioner took

his deposition in the Harper County proceedings prior to the trial. If petitioner seeks to hold respondent Kopp liable on the ground that he committed perjury in the Harper County trial, this respondent suggests that there is no basis in any documents filed in this cause for such an accusation (and in fact there could be no basis therefor) nevertheless under the law, respondent Kopp could not be held liable therefor in an action arising on account of alleged violation of rights accorded to petitioner by the Civil Rights Statutes and the 14th Amendment.

CONCLUSION.

In the Supreme Court of Kansas Petitioner raised all of these contentions concerning the aforesaid Exhibit 8 (See Helen Weede's Exhibit No. 49 (W-984)). Judge Harvey of the Supreme Court of Kansas in his opinion in 136 Kan. 711, l. c. 715-716 (C-31), in answering Petitioner's complaint concerning Commerce Trust Company's Exhibit 8 said: "There is no contention now that this summary was not an appropriate and accurate one compiled from the books of the partnership" (C-31). Petitioner has repeatedly reasserted these contentions in other courts and in all instances these courts have denied them.

On page 21 of Petitioner's petition reference is made to a secret conference had with the district judge by Messrs. Howard and Weede as emissaries of the Commerce Trust Company. In connection therewith we will suggest that the question of the secret conferences has been presented many times and has been completely answered in paragraphs (8, 9) of Judge Bratton's opinion in the case of *Moffett* v. *Robbins*, 81 F. 2d l. c. 436, and we earnestly request the court to read these paragraphs.

Petitioners persist in their fallacious contention that the decision in the *Howard Fee Case*, 345 Mo. 741, had the

effect of setting aside the Kansas and federal court decisions. This question is fully answered by the above quoted paragraphs from the decision in that case which especially state that the only question decided was that respondent Howard was not entitled to additional attorney fees. We will further suggest that the supreme court had no jurisdiction in the case before it to pass upon any question except the allowance of attorney's fees, of which the probate court had original jurisdiction and the circuit court and the supreme court had only derivative jurisdiction.

Right or wrong, the judgments and decisions assailed are final and binding on Petitioner. This is conclusively shown by the authorities presented in the briefs of respondents Helen Weede and Orlin A. Weede and of respondent Commerce Trust Company in the instant case. This Moffett litigation has been kept in the courts by the Petitioner and by her counsel for more than 20 years and it would seem that there should be an end to this litigation. Justice Story, years ago, in *Ocean Ins. Co.* v. *Fields*, 2 Story 59, F. Cas. No. 10406, made an observation which has direct application to this case. Chief Justice Taft referring to that case said:

> "It is for the public interest and policy to make an end to litigation; or as was pointedly said by a great jurist, THAT SUITS MAY NOT BE IMMORTAL WHILE MEN ARE MORTAL" (Emphasis ours).

From what we have said, we are convinced that the petition for a writ of certiorari should be denied.

Respectfully submitted,

B. C. Howard,
William Dennis Bush,
Attorneys for Respondents, B. C. Howard and William H. Kopp.